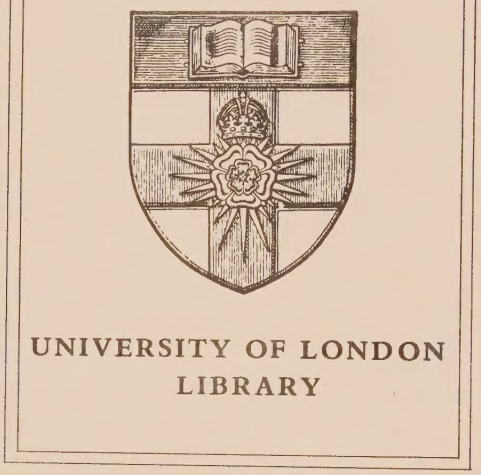
THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

REFERENCE ONLY

Mx. North Gallery.



Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-family-division_1960

THE
LAW REPORTS
1960

Probate, Divorce, and Admiralty Division

and on Appeal therefrom in the

Court of Appeal

and Decisions in the

Ecclesiastical Courts

London

THE INCORPORATED COUNCIL OF LAW REPORTING
FOR ENGLAND AND WALES

Published by the Incorporated Council of Law Reporting for England and Wales · 3 Stone Buildings, Lincoln's Inn, London, W.C.2, and printed by The Eastern Press, Ltd., London and Reading

THE INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES

Chairman
The Hon. Mr. Justice McNair

Vice-Chairman
Sir Leslie Farrer, K.C.V.O.

EX-OFFICIO MEMBERS

The Rt. Hon. Sir Reginald Manningham-Buller, Bart., Q.C., M.P.
Attorney-General

The Rt. Hon. Sir Jocelyn Simon, Q.C., M.P.
Solicitor-General

Denys T. Hicks, Esq., O.B.E., T.D., D.L.
President of The Law Society

NOMINATED MEMBERS

Lincoln's Inn
The Rt. Hon. Lord Jenkins — C. Montgomery White, Esq., Q.C.

Inner Temple
J. V. Nesbitt, Esq. — R. T. Monier-Williams, Esq., O.B.E.

Middle Temple
W. Latey, Esq., M.B.E., Q.C. — Montague L. Berryman, Esq., Q.C.

Gray's Inn
The Hon. Mr. Justice McNair — The Hon. Mr. Justice Edmund Davies

General Council of the Bar
G. W. Tookey, Esq., Q.C. — John Thompson, Esq., Q.C.

The Law Society
Sir Leslie Farrer, K.C.V.O. — Kenneth D. Cole, Esq.

CO-OPTED MEMBERS
A. G. P. Johnson, Esq. — R. E. Megarry, Esq., Q.C.

Secretary
F. G. Hudson, Esq.

Assistant Secretary
F. E. Smith, Esq.

3 Stone Buildings, Lincoln's Inn, W.C.2

EDITORS AND REPORTERS

*

Editor—R. P. Colinvaux, Barrister-at-Law

Assistant Editor—Charles Clayton, Barrister-at-Law

*

REPORTERS

House of Lords
F. H. Cowper
J. A. Griffiths

Privy Council
Charles Clayton

Court of Appeal No. 1
B. A. Bicknell E. Dangerfield

Court of Appeal No. 2
F. R. Dymond I. G. R. Moses

Court of Appeal No. 3
M. M. Hill N. Primost

Chancery Division
K. R. A. Hart M. G. Thomas V. A. Moxon

Queen's Bench Division, Court of Criminal Appeal and Courts-Martial Appeal Court
J. D. Pennington J. F. Lamb C. J. Ellis
E. M. Wellwood

Probate and Divorce
J. B. Gardner E. Jones

Admiralty Division
B. D. J. Walsh

Restrictive Practices
J. F. Lamb N. Primost
Barristers-at-Law

JUDGES

OF

THE COURT OF APPEAL

1960

Viscount KILMUIR, Lord Chancellor

Lord PARKER OF WADDINGTON, Lord Chief Justice of England

Lord EVERSHED, Master of the Rolls

Lord MERRIMAN	President of the Probate, Divorce, and Admiralty Division
Sir FRANCIS LORD CHARLTON HODSON (created a Lord of Appeal in Ordinary, Sept. 1960)	Lords Justices
Sir FREDERIC AKED SELLERS	
Sir BENJAMIN ORMEROD	
Sir EDWARD HOLROYD PEARCE	
Sir HENRY GORDON WILLMER	
Sir CHARLES EUSTACE HARMAN	
Sir PATRICK ARTHUR DEVLIN	
Sir GERALD RITCHIE UPJOHN	
Sir TERENCE NORBERT DONOVAN (appointed a Lord Justice of Appeal, Sept. 1960)	

JUDGES

OF THE

PROBATE, DIVORCE, AND ADMIRALTY DIVISION

OF

THE HIGH COURT OF JUSTICE

1960

Lord Merriman, President

Sir Hubert Joseph Wallington (retired Sept. 1960)

Sir Charles Arthur Collingwood

Sir Seymour Edward Karminski

Sir Aubrey Melford Stevenson

Sir Geoffrey Walter Wrangham

Sir Joseph Bushby Hewson

Sir Henry Josceline Phillimore

Sir Archie Pellow Marshall

Sir Harry Vincent Lloyd-Jones

Sir David Arnold Scott Cairns (appointed Sept. 1960)

Attorney-General

Sir Reginald Edward Manningham-Buller, Bart.

Solicitor-General

Sir Jocelyn Simon

The Mode of Citation of the Volumes of the *Law Reports* for 1960 is as follows:

[1960] Ch. [1960] P.

[1960] 1 Q.B. [1960] 2 Q.B.

[1960] A.C.

TABLE OF CASES REPORTED

IN THIS VOLUME

	PAGE
B	
Blacker *v.* Blacker	146
C	
Carlbom (John) & Co. Ltd. *v.* Zafiro (Owners). The Zafiro	1
Clark, Grainger *v.* Grainger and	99
Compton *v.* Compton and Hussey	201
Cousens, Hobbs *v.* Hobbs and	112
F	
Fildes (formerly Simkin) *v.* Simkin	70
Fisher *v.* Fisher	36
Francis *v.* Francis	17
G	
Grainger *v.* Grainger and Clark	99
H	
Hill (orse. Petchey) *v.* Hill	130
Hobbs *v.* Hobbs and Cousens	112
Hull *v.* Hull	118
Hussey, Compton *v.* Compton and	201
L	
Lilley *v.* Lilley	158
M	
Mesure *v.* Mesure	184
S	
St. Swithin's, Norwich, *In re*	77
Schlesinger *v.* Schlesinger	191
Simkin, Fildes (formerly Simkin) *v.*	70
W	
Whysall *v.* Whysall	52
Winstone *v.* Winstone	28
Wright *v.* Wright	85
Z	
Zafiro (Owners), John Carlbom & Co. Ltd. *v.* The Zafiro	1

TABLE OF CASES CITED AND JUDICIALLY NOTICED

Aff. affirmed
Appl. applied
Appr. approved
C. considered
D. disapproved
Dist. distinguished
E. explained
F. followed
N.F. not followed
O. overruled
Q. questioned
R. referred to in judgment
Rev. reversed

			Page
A. B., *In re*	[1954] 2 Q.B. 385; [1954] 3 W.L.R. 1; [1954] 2 All E.R. 287	*R.*	125
Addison *v.* Addison	[1955] N.I. 1	*C.*	130, 143, 145
Anderson *v.* Bank of Columbia	2 Ch.D. 644		114
Andrews, *In re*	[1958] Ch. 665; [1958] 2 W.L.R. 946; [1958] 2 All E.R. 308	*R.*	125
Anglo-Baltic and Mediterranean Bank *v.* Barber & Co.	[1924] 2 K.B. 410	*Appl.*	3, 11
Australian Direct Steam Navigation Co., *In re*	L.R. 20 Eq. 325	*Appl.*	3, 8, 15
Baker *v.* Baker	[1950] W.N. 29; 66 T.L.R. (Pt. 1) 81	*Appl.*	159, 166–168, 179
Bater *v.* Bater	[1906] P. 209; 22 T.L.R. 408		119
Baxter *v.* Baxter	[1948] A.C. 274; 64 T.L.R. 8; [1947] 2 All E.R. 886	*R.*	141
Bernard *v.* Bernard	[1958] 1 W.L.R. 1275; [1958] 3 All E.R. 475		119
Bideford, *In re* The Parish of	[1900] P. 314; 16 T.L.R. 540	*R.*	80
Birch *v.* Birch	28 L.T. 540	*Dist.*	86, 93, 94, 98
Blunt *v.* Blunt	[1943] A.C. 517; 59 T.L.R. 315; [1943] 2 All E.R. 76	*R.*	120
Bolton *v.* Corporation of Liverpool	1 My. & K. 88		115
Bosworthick *v.* Bosworthick	18 T.L.R. 104	*R.*	97
Boyd *v.* Boyd	[1955] P. 126n.; 55 T.L.R. 3; [1938] 4 All E.R. 181	*R.*	97
Bragg *v.* Bragg	[1925] P. 20; 41 T.L.R. 8	*R.*	73
Bright *v.* Bright	[1954] P. 270; [1953] 3 W.L.R. 659; [1953] 2 All E.R. 939	*D.*	37, 43, 45–49
Broken Hill Proprietary Co. *v.* Broken Hill Municipal Council	[1926] A.C. 94		41
Bromage, *In re.* Public Trustee *v.* Cuthbert (Infant)	[1935] Ch. 605; 51 T.L.R. 408	*R.*	25
Bullock & Co. *v.* Corry & Co.	3 Q.B.D. 356	*R.*	117
Calcraft *v.* Guest	[1898] 1 Q.B. 759		115
Campbell *v.* Paddington (Parishioners and Inhabitants)	2 Rob.Eccl. 558	*R.*	80
Casey *v.* Casey	[1949] P. 420; 65 T.L.R. 528	*Dist.*	130, 138, 139, 143–145
Cella, The	13 P.D. 82	*C.*	3, 11–13

Chapman *v.* Chapman	Unreported, April 4, 1951	*R.*	167, 179
Chapman *v.* Chapman	[1938] P. 93; 54 T.L.R. 462; [1938] 1 All E.R. 635	*R.*	154, 155
Clark *v.* Clark	[1956] 1 W.L.R. 345; [1956] 1 All E.R. 823		161
Clear *v.* Clear	[1958] 1 W.L.R. 467; [1958] 2 All E.R. 353	*R.*	196
Cleveland Literary and Philosophical Society's Land, *In re*	[1931] 2 Ch. 247	*R.*	83
Conradi *v.* Conradi	L.R. 1 P. & M. 514	*R.*	130
Cooper *v.* Cooper	[1955] P. 99; [1954] 3 W.L.R. 867; [1954] 3 All E.R. 415	*C.*	86, 96, 97
Cooper *v.* Cooper (No. 2)	[1955] P. 168; [1954] 3 W.L.R. 923; [1954] 3 All E.R. 358	*R.*	46–48
Cooper *v.* Cooper (No. 2)	[1955] P. 168; [1954] 3 W.L.R. 923; [1954] 3 All E.R. 358		119
Cooper *v.* Crane	[1891] P. 369	*R.*	134
Corbett *v.* Corbett	[1953] P. 205; [1953] 2 W.L.R. 1124; [1953] 2 All E.R. 69	*Dist.*	118, 126–128
Cotton *v.* Cotton	[1954] P. 305; [1954] 2 W.L.R. 947; [1954] 2 All E.R. 105	*Appl.*	17, 24, 25, 27
Crowther *v.* Crowther	[1951] A.C. 723; [1951] 1 T.L.R. 1149; [1951] 1 All E.R. 1131	*Appl.*	159, 166, 182, 183
Curtis *v.* Beaney	[1911] P. 181; 27 T.L.R. 462		113
Dalrymple *v.* Dalrymple	2 Hag.Con. 54	*R.*	133
Daniell *v.* Daniell	The Times, Feb. 2, 1954	*R.*	98
Dapueto *v.* Wyllie, The Pieve Superiore	L.R. 5 P.C. 482; 22 W.R. 777; 2 Asp.M.L.C. 319		6
de Hoghton, *In re*	[1896] 2 Ch. 385	*R.*	200
De Reneville *v.* De Reneville	[1948] P. 100; 64 T.L.R. 82; [1948] 1 All E.R. 56	*R.*	138, 139, 143
Dewe *v.* Dewe; Snowdon *v.* Snowdon	[1928] P. 113; 44 T.L.R. 274		162
Dickinson *v.* Dickinson	[1913] P. 198; 29 T.L.R. 765	*R.*	144
Drew *v.* Drew	13 P.D. 97	*Appl.*	159, 182
Duchesne *v.* Duchesne	[1951] P. 101; 66 T.L.R. (Pt. 2) 639; [1950] 2 All E.R. 784	*Dist.*	118, 123, 128
Dyson *v.* Dyson	[1954] P. 198; [1953] 3 W.L.R. 1141; [1953] 2 All E.R. 1511		162

Easterbrook *v.* Easterbrook . .	[1944] P. 10; 60 T.L.R. 80; [1944] 1 All E.R. 90	*R.* . .	135, 140, 145
Everitt *v.* Everitt	[1949] P. 374; [1949] 1 All E.R. 908	. . . .	162
Faulkner *v.* Faulkner . . .	57 T.L.R. 628; [1941] 2 All E.R. 748	*R.*	151
Finney *v.* Finney	L.R. 1 P. & M. 483	*R.*	130
Fisher *v.* Fisher	[1959] 3 W.L.R. 471; [1959] 3 All E.R. 131	. . . .	119
Ford, *In re*, *Ex p.* The Trustee .	[1900] 2 Q.B. 211; 16 T.L.R. 399; 48 W.R. 688; 7 Mans. 281	. . . .	6
Foster *v.* Foster	[1954] P. 67; [1953] 3 W.L.R. 623; [1953] 2 All E.R. 518	*R.* . . .	46–48
Gilbey *v.* Gilbey	[1927] P. 197; 43 T.L.R. 283	*C.* . . .	192, 197
Gordon *v.* Gordon and Granville Gordon	[1903] P. 141 .	*R.*	27
Greenstreat *v.* Cumyns . . .	2 Hag.Con. 332 .	*R.*	144
Hadden *v.* Hadden	The Times, Dec. 5, 1919	*R.*	95
Hargreaves *v.* Hargreaves . .	[1926] P. 42; 42 T.L.R. 252	*Appl.* . .	202, 210
Harriman *v.* Harriman . . .	[1909] P. 123; 25 T.L.R. 291	. . . .	119
Harrison *v.* Mortgage Insurance Corporation	10 T.L.R. 141 .	*Appl.* . .	3, 10
Hartopp *v.* Hartopp and Akhurst .	[1899] P. 65; 15 T.L.R. 168	*R.*	214
Henderson *v.* Henderson . . .	3 Hare 100 . .	*R.*	43
Hill *v.* Hill	[1954] P. 291; [1954] 2 W.L.R. 473; [1954] 1 All E.R. 491	*R.*	46
Hoystead *v.* Commissioner of Taxation	[1926] A.C. 155; 42 T.L.R. 207	*R.* . .	43, 45, 48, 49
Hoystead *v.* Taxation Commissioner	[1926] A.C. 155; 42 T.L.R. 207	. . . .	119
Hutter *v.* Hutter	[1944] P. 95; 60 T.L.R. 541; [1944] 2 All E.R. 368	*R.* .	132, 136, 137, 140, 143, 145
Inverclyde *v.* Inverclyde . . .	[1931] P. 29; 47 T.L.R. 140	*R.* .	134–141, 143–145
Ivens *v.* Ivens	[1955] P. 129; [1954] 3 W.L.R. 887; [1954] 3 All E.R. 446	*C.* . .	86, 97, 98
J. *v.* J.	[1955] P. 215; [1955] 2 W.L.R. 973; [1955] 2 All E.R. 85; [1955] 3 W.L.R. 72; [1955] 2 All E.R. 617	*Appl.* .	191, 197, 201
Jackson *v.* Jackson	48 T.L.R. 206; 146 L.T. 406	*R.*	178

Jamieson *v.* Jamieson	[1952] A.C. 525; [1952] 1 T.L.R. 833; [1952] 1 All E.R. 875; 1951 S.C. 286	*R.*	95–97
Jones *v.* Great Central Railway	[1910] A.C. 4		113
Jones *v.* Guardians of Newtown and Llanidloes	[1920] 3 K.B. 381; 36 T.L.R. 758	*R.*	166
Jones *v.* Jones	[1924] P. 203; 46 T.L.R. 33		173
Kaslefsky *v.* Kaslefsky	[1951] P. 38; 66 T.L.R. (Pt. 2) 616; [1950] 2 All E.R. 398	*Dist.*	86, 93, 98
Keeley *v.* Keeley	[1952] W.N. 496; [1952] 2 T.L.R. 756	*Appl.*	159, 165, 181
Kettlewell *v.* Kettlewell	[1898] P. 138; 14 T.L.R. 96	*C.*	192, 197
King *v.* King	[1953] A.C. 124; [1952] 2 T.L.R. 429; [1952] 2 All E.R. 584	*R.*	96
Knight *v.* Marquess of Waterford	2 Y. & C.Ex. 22		115
Le Mesurier *v.* Le Mesurier	[1895] A.C. 517; 11 T.L.R. 481	*R.*	138, 140
Leng *v.* Leng	62 T.L.R. 722; [1946] 2 All E.R. 590	*Appl.*	159, 184
Lewis *v.* Hayward	35 L.J.P. & M. 105	*R.*	145
Lindsay *v.* Lindsay	[1934] P. 162; 50 T.L.R. 441	*R.*	123
Linke *v.* Van Aerde	10 T.L.R. 426	*R.*	134
Lock *v.* Lock	[1958] 1 W.L.R. 1248; [1958] 3 All E.R. 472	*R.*	65
Longthorn *v.* British Transport Commission	[1959] 1 W.L.R. 530; [1959] 2 All E.R. 32		114
Lorriman *v.* Lorriman and Clair	[1908] P. 282; 24 T.L.R. 575	*R.*	214
March *v.* March and Palumbo	L.R. 1 P. & M. 437	*Appl.*	203, 213, 214, 216
Marquis Camden *v.* Inland Revenue Commissioners	[1914] 1 K.B. 641		57
Martell *v.* Consett Iron Co. Ltd.	[1955] Ch. 363; [1955] 2 W.L.R. 463; [1955] 1 All E.R. 481	*R.*	128
Martin's Trusts, *In re*	34 Ch.D. 618	*R.*	64
Mason's Orphanage and London and North Western Railway Co., *In re*	[1896] 1 Ch. 596; 12 T.L.R. 236	*R.*	84
Miller *v.* Minister of Pensions	[1947] W.N. 241; 63 T.L.R. 474; [1947] 2 All E.R. 372		21
Millichamp *v.* Millichamp	146 L.T. 96		172
Minet *v.* Morgan	L.R. 8 Ch. 361		115
Morgan *v.* Hart	[1914] 2 K.B. 183	*E.*	29, 34
Morris *v.* Davies	5 Cl. & Fin. 163	*R.*	25
Morton *v.* Morton	58 T.L.R. 158; [1942] 1 All E.R. 273		172
Morton *v.* Morton (No. 2)	[1954] 1 W.L.R. 737; [1954] 2 All E.R. 248		162, 173
Mostyn *v.* West Mostyn Coal and Iron Co.	34 L.T. 531		115

N. *v.* N.	44 T.L.R. 324 .	*Appl.* . . 191, 197
National Assistance Board *v.* Parkes	[1955] 2 Q.B. 506; [1955] 3 W.L.R. 347; [1955] 3 All E.R. 1	*R.* . 166, 168, 179, 180
National Assistance Board *v.* Wilkinson	[1952] 2 Q.B. 648; [1952] 2 T.L.R. 11; [1952] 2 All E.R. 255	*R.* 168
New Brunswick Railway Co. *v.* British and French Trust Corporation Ltd.	[1939] A.C. 1; 55 T.L.R. 260; [1938] 4 All E.R. 747	*R.* 44
Nicholl *v.* Jones	2 H. & M. 588 .	 114
Ord *v.* Ord	[1923] 2 K.B. 432; 39 T.L.R. 437	*R.* 120
Outerbridge *v.* Outerbridge . .	[1927] 1 K.B. 368; 43 T.L.R. 33	 71
Oxford Group *v.* Inland Revenue Commissioners	[1949] 2 All E.R. 537	*R.* 83
Papadopoulos *v.* Papadopoulos .	[1930] P. 55; 46 T.L.R. 44	 161
Pardy *v.* Pardy	[1939] P. 288; 55 T.L.R. 1037; [1939] 3 All E.R. 779	*Appl.* . . 159, 181
Pearce *v.* Foster	15 Q.B.D. 114; 1 T.L.R. 502	*R.* 117
Pike *v.* Pike	[1954] P. 81n.; [1953] 3 W.L.R. 634n.; [1953] 1 All E.R. 232	 40
Pinnick *v.* Pinnick	[1957] 1 W.L.R. 644; [1957] 1 All E.R. 873	*R.* . . 166, 179, 180
Price *v.* Price	[1951] P. 413; [1951] 2 All E.R. 580n.	*R.* . . . 167, 180
Pryor *v.* Pryor	[1947] P. 64; 63 T.L.R. 208; [1947] 1 All E.R. 381	 101
Put *v.* Rawsterne	T.Raym. 472 .	 42
Ramsay-Fairfax *v.* Ramsay-Fairfax	[1956] P. 115; [1955] 3 W.L.R. 849; [1955] 3 All E.R. 695	*Appl.* 130, 139, 141–145
Randall *v.* Randall	[1939] P. 131; 55 T.L.R. 224; [1938] 4 All E.R. 696	*Appl.* . 53, 62, 65, 67
Read *v.* Legard	6 Ex. 636 . .	 160
Reg. *v.* Hepworth and Fearnley .	[1955] 2 Q.B. 600; [1955] 3 W.L.R. 331; [1955] 2 All E.R. 918	 21
Reg. *v.* Hutchings	6 Q.B.D. 300 .	 38
Reg. *v.* Twiss	L.R. 4 Q.B. 407 .	*R.* 80
Rio Grande do Sul S.S. Co., *In re*	5 Ch.D. 282 . .	 6
Robertson *v.* Robertson . . .	[1954] 1 W.L.R. 1537; [1954] 3 All E.R. 413	*R.* . . 151, 155, 156
Robinson *v.* Robinson . . .	[1943] P. 43; 59 T.L.R. 170; [1943] 1 All E.R. 251	*R.* 123

Rossage *v.* Rossage	[1960] 1 W.L.R. 249; [1960] 1 All E.R. 600	*R.*	126
Russell *v.* Russell	[1897] A.C. 395; 13 T.L.R. 516		170
Russell *v.* Russell	[1924] A.C. 687; 40 T.L.R. 713		23
Ruther *v.* Ruther	[1903] 2 K.B. 270		71
St. Mark's Church, Lincoln, *In re*	[1956] P. 166; [1956] 3 W.L.R. 147	*R.*	80
St. Nicholas, Leicester *v.* Langton	[1899] P. 19	*R.*	80
Salvesen (or Van Lorang) *v.* Administrator of Austrian Property	[1927] A.C. 641; 43 T.L.R. 609	*R.*	135, 136, 138, 143
Sandler *v.* Sandler	[1934] P. 149; 50 T.L.R. 397	*R.*	151, 154
Schlesinger *v.* Schlesinger	[1959] 1 W.L.R. 92; [1959] 1 All E.R. 155; [1958] 1 W.L.R. 882; [1958] 3 All E.R. 20		192
Schneider *v.* Leigh	[1955] 2 Q.B. 195; [1955] 2 W.L.R. 904; [1955] 2 All E.R. 173		115
Scott *v.* Scott	[1951] P. 245; [1951] 1 All E.R. 216		169
Seabrook *v.* British Transport Commission	[1959] 1 W.L.R. 509; [1959] 2 All E.R. 15		114
Silverstone *v.* Silverstone	[1953] P. 174; [1953] 2 W.L.R. 513; [1953] 1 All E.R. 556	*Dist.*	29, 35
Simonin *v.* Mallac	2 Sw. & Tr. 67	*R.*	133, 134, 136, 145
Simpson *v.* Simpson	[1951] P. 320; [1951] 1 T.L.R. 1019; [1951] 1 All E.R. 955	*R.*	95, 96
Smith *v.* Smith	[1940] P. 179; 56 T.L.R. 760; [1940] 2 All E.R. 595	*F.*	53, 64
Smyth *v.* Smyth	[1956] P. 427; [1956] 3 W.L.R. 210; [1956] 2 All E.R. 476	*R.*	76
Society of Medical Officers of Health *v.* Hope	[1959] 1 Q.B. 462; [1959] 2 W.L.R. 377; [1959] 1 All E.R. 509	*R.*	45
Sottomayor *v.* De Barros	2 P.D. 81; 3 P.D. 1	*R.*	133, 134
Spawforth *v.* Spawforth	[1946] P. 131; 62 T.L.R. 262; [1946] 1 All E.R. 379	*Appl.*	147, 150, 154
Squire *v.* Squire	[1949] P. 51; 64 T.L.R. 371; [1948] 2 All E.R. 51	*Appl.*	85, 94–96, 98
Starkie *v.* Starkie (No. 2)	[1954] 1 W.L.R. 98; [1953] 2 All E.R. 1519	*R.*	167, 179

Stopher *v.* National Assistance Board	[1955] 1 Q.B. 486; [1955] 2 W.L.R. 622; [1955] 1 All E.R. 700	*R.*	179
Stratton, *In re*	[1931] 1 Ch. 197; 47 T.L.R. 32	*R.*	83
Stringer *v.* Stringer	[1952] P. 171; [1952] 1 T.L.R. 415; [1952] 1 All E.R. 373	*R.*	167
Sugden *v.* Sugden	[1957] P. 120; [1957] 2 W.L.R. 210; [1957] 1 All E.R. 300; reversing [1956] 3 W.L.R. 1010; [1956] 3 All E.R. 874	*R.*	107
Swettenham *v.* Swettenham	[1938] P. 218; 54 T.L.R. 903; [1938] 3 All E.R. 183		55
Swiszczowski *v.* Swiszczowski	[1959] 1 W.L.R. 187; [1959] 1 All E.R. 495	*O.*	147, 152, 153, 155
Swymer *v.* Swymer	[1955] P. 11; [1954] 1 W.L.R. 1329 & 3 W.L.R. 803; [1954] 3 All E.R. 114 and 502	*Dist.*	185, 187, 190
Thatcher *v.* Thatcher	[1959] 1 W.L.R. 730; [1959] 2 All E.R. 649	*O.*	147, 152, 153, 155
Thomas *v.* Thomas	62 T.L.R. 166; [1946] 1 All E.R. 170		161
Thomas *v.* Thomas	[1924] P. 194; 40 T.L.R. 250		163
Thompson *v.* Thompson	[1957] P. 19; [1957] 2 W.L.R. 138; [1957] 1 All E.R. 161	*R.*	124, 128
Thompson *v.* Thompson	[1957] P. 19; [1957] 2 W.L.R. 138; [1957] 1 All E.R. 161	*Appl.*	37, 45, 46, 50
Thompson *v.* Thompson	17 T.L.R. 572	*R.*	97
Timmins *v.* Timmins	[1953] 1 W.L.R. 757; [1953] 2 All E.R. 187		161
Timmins *v.* Timmins	[1953] 1 W.L.R. 757; [1953] 2 All E.R. 187		40
Tulip *v.* Tulip	[1951] P. 378; [1951] 1 T.L.R. 1056; [1951] 2 All E.R. 91	*R.*	166, 167, 179
W. *v.* W. (No. 2)	[1954] P. 486; [1954] 3 W.L.R. 381; [1954] 2 All E.R. 829		161
Walsham *v.* Stainton	2 H. & M. 1		113
Waters *v.* Waters	[1956] P. 344; [1956] 2 W.L.R. 661; [1956] 1 All E.R. 432		90

Watson *v.* Watson	[1954] P. 48; [1953] 3 W.L.R. 708; [1953] 2 All E.R. 1013	*Appr.*	17, 24, 27
Watt (or Thomas) *v.* Thomas	[1947] A.C. 484; [1947] 1 All E.R. 582	*R.*	92
Westbury *v.* Twigg	[1892] 1 Q.B. 77; 40 W.R. 208		7
White *v.* White	[1937] P. 111; [1937] 1 All E.R. 708; 53 T.L.R. 442	*R.*	136
Whittaker *v.* Whittaker	[1939] W.N. 332; 55 T.L.R. 1070; [1939] 3 All E.R. 833		162
Whysall *v.* Whysall	[1960] P. 52; [1959] 3 W.L.R. 592; [1959] 3 All E.R. 389	*R.*	188
Wilson *v.* Rastall	4 Term Rep. 753		114
Winnan *v.* Winnan	[1949] P. 174; 65 T.L.R. 22; [1948] 2 All E.R. 862	*Appl.*	37, 50
Winstone *v.* Winstone	[1959] 3 W.L.R. 660; [1959] 3 All E.R. 580	*R.*	125

STATUTES JUDICIALLY CONSIDERED

1855

Charitable Trusts Amendment Act, 1855 (18 & 19 *Vict. c.* 124), *s.* 29 **J. H. Ellison Ch. 77**

1857

Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 22 - **Collingwood J. 130**

1895

Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39), *s.* 4 **Divl.Ct. and C.A. 158**

—— —— *s.* 5 (*c*) - - - **Divl.Ct. 70**

1925

Settled Land Act, 1925 (15 & 16 *Geo.* 5, *c.* 18), *s.* 29 - - **J. H. Ellison Ch. 77**

Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 32 - - - **Collingwood J. 130**

—— —— *s.* 45 - - - - **Winn J. 28**

1948

Companies Act, 1948 (11 & 12 *Geo.* 6, *c.* 38), *ss.* 228, 325 - - **Hewson J. 1**

1950

Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 1 (1) (*b*) - - - **C.A. 146**

—— —— *s.* 1 (1) (*d*) - - **Phillimore J. 52**
Lloyd-Jones J. 184

—— —— *s.* 2 - - - - **Winn J. 28**

—— —— *s.* 20 (2) - - - **Sachs J. 191**

—— —— *ss.* 24 (1), 25 - **Marshall J. 201**

—— —— *s.* 26 (1) - - - - **C.A. 99**

1952

Magistrates' Courts Act, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 55), *s.* 76 - **Divl.Ct. 70**

1958

Divorce (Insanity and Desertion) Act, 1958 (6 & 7 *Eliz.* 2, *c.* 54), *s.* 1 (1) (3) **Lloyd-Jones J. 184**

STATUTORY RULES, ORDERS AND INSTRUMENTS JUDICIALLY CONSIDERED

Matrimonial Causes Rules, 1957 (*S.I.* 1957, *No.* 619), *r.* 2 - - **Winn J. 28**

—— —— *r.* 3 (2) - - - - - **C.A. 146**

R.S.C., Ord. 70, *r.* 1 - - - **C.A. 146**

CASES

DETERMINED BY THE

PROBATE DIVORCE & ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS

JOHN CARLBOM & CO. LTD. *v.* ZAFIRO (OWNERS). THE ZAFIRO.

1959
April 27, 28;
May 6.

Hewson J.

[1958 J. 540.]

Company—Winding up—Execution—Arrest of vessel—Action in rem—Voluntary liquidation—Whether creditor for necessaries can become secured creditor by arresting company's vessel after notice of meeting to propose voluntary winding up—Companies Act, 1948 (11 & 12 *Geo.* 6, *c.* 38), *s.* 325.

Admiralty—Arrest of vessel—Action in rem—Necessaries claim—Whether arrest "execution"—Companies Act, 1948 (11 & 12 *Geo.* 6, *c.* 38), *ss.* 228, 325.

Ships' Names—Zafiro.

Between the months of November, 1957, and January, 1958, the plaintiffs made necessary disbursements on account of the vessels *Oro* and *Zafiro*, both of which were owned by the defendant company. On January 17, 1958, the defendant company published in the London Gazette a notice that an extraordinary general meeting of their creditors would be held on February 14, 1958, for the purpose, if thought fit, of proposing a resolution for voluntary winding up and of nominating a liquidator, and on January 22, 1958, notice of this

1959

THE ZAFIRO.

meeting was sent to the plaintiffs. On February 3, 1958, the plaintiffs issued a writ in rem against the *Zafiro* and arrested that vessel on the same day. On February 14, 1958, the creditors of the defendant company passed a resolution that the company should be wound up and appointed a liquidator, notice of whose appointment was sent to the plaintiffs on February 17. On March 10, 1958, Karminski J. ordered the *Zafiro* to be appraised and sold, and she was sold on March 25, the proceeds of sale being paid into court.

In the first motion, the plaintiffs moved for judgment in default of defence against the defendants and/or the proceeds of sale, and for payment out of the sum due to them.

In the second motion, the defendants moved for an order that the action be stayed on the ground that since the issue of the writ the resolution for the voluntary winding up of the defendant company had been passed, and that before the issue of the writ the plaintiffs had been given notice of the meeting at which such resolution was to be proposed. The defendants further sought an order that the proceeds of sale of the *Zafiro* be paid out to them after the satisfaction of the claim of the owners of another vessel, who had previously obtained judgment against the *Zafiro* in a collision action:—

Held, (1) that the arrest of a vessel was not an "execution" within the meaning of section 325 of the Companies Act, 1948,[1] and, accordingly, the plaintiffs were entitled to the benefit of the arrest of the *Zafiro* as against the liquidator in spite of the prior notice of the meeting at which a resolution for the winding up of the defendant company was to be proposed.

(2) That by arresting the *Zafiro* the plaintiffs had become secured creditors.

(3) That the general practice of the court was to stay all actions against a company after the commencement of the voluntary winding up of the company, save in special circumstances. This being an action for necessary disbursements, in which the writ was issued

[1] Companies Act, 1948, s. 325: "(1) Where a creditor has issued "execution against the goods . . . of "a company or has attached any "debt due to the company, and the "company is subsequently wound up, "he shall not be entitled to retain "the benefit of the execution or "attachment against the liquidator "in the winding up of the company "unless he has completed the execu-"tion or attachment before the com-"mencement of the winding up: "Provided that—(*a*) where any credi-"tor has had notice of a meeting "having been called at which a "resolution for voluntary winding "up is to be proposed, the date on "which the creditor so had notice "shall, for the purposes of the fore-"going provision, be substituted for "the date of the commencement of "the winding up . . . (*c*) the rights "conferred by this subsection on "the liquidator may be set aside by "the court in favour of the creditor to "such extent and subject to such "terms as the court may think fit. "(2) For the purposes of this section, "an execution against goods shall be "taken to be completed by seizure "and sale . . . (3) In this section the "expression 'goods' includes all "chattels personal, and the expres-"sion 'sheriff' includes any officer "charged with the execution of a "writ or other process."

and the vessel arrested, though after notice of the meeting, before the resolution was passed, the arrest of the vessel constituted, however, such a special circumstance.

In re Australian Direct Steam Navigation Co. (1875) L.R. 20 Eq. 325; *Harrison* v. *Mortgage Insurance Corporation* (1893) 10 T.L.R. 141; *Anglo-Baltic and Mediterranean Bank* v. *Barber & Co.* [1924] 2 K.B. 410 applied.

The Cella (1888) 13 P.D. 82 considered.

TWO MOTIONS.

Between the months of November, 1957, and January, 1958, the plaintiffs made necessary disbursements to the value of £239 16s. on account of two vessels, the *Oro* and the *Zafiro*, both of which were owned by the defendants, the B. and G. Shipping Co. Ltd.

On January 6, 1958, a collision occurred between the *Zafiro* and the steamship *Pinewood* whilst the latter was moored in Immingham Dock. The owners of the *Pinewood* commenced an action for damages against the *Zafiro* and obtained judgment therein.

Meanwhile, on January 17, 1958, the defendant company published in the London Gazette a notice that a meeting of their creditors would be held on February 14, 1958, for the purpose, if they thought fit, of proposing a resolution for voluntary winding up and of nominating a liquidator, and on January 22, 1958, notice of this meeting was sent by post to the company's creditors, including the plaintiffs.

On February 3, 1958, the plaintiffs issued a writ in rem in the present action against the *Zafiro* for the necessary disbursements made by them in respect of both the *Zafiro* and the *Oro*, and on the same day they arrested the *Zafiro* in London under the provisions of sections 1 and 3 of the Administration of Justice Act, 1956. On February 10, 1958, appearance to the writ was entered on behalf of the defendants.

On February 14, 1958, the creditors of the defendant company passed a resolution that the company should be wound up, and appointed a liquidator, notice of whose appointment was sent to the plaintiffs on February 17.

On March 3, 1958, the plaintiffs delivered their statement of claim to the defendants, and on March 10, at the instance of the liquidator, who regarded the *Zafiro* under arrest with three of her crew on board as a wasting asset, Karminski J. ordered that the *Zafiro* be appraised and sold by the Admiralty Marshal. The *Zafiro* was in fact sold for more than £5,000 on March 25, 1958, and the proceeds of sale were paid into court.

1959

THE ZAFIRO.

In the first motion, the plaintiffs asked for judgment in default of defence against the defendants and/or the proceeds of sale for their claim or as might be found on reference; and they also asked for payment out of this amount.

In the second motion, the defendants asked that the present action be stayed on the ground that since the date of the issue of the writ the resolution for the voluntary winding up of their company had been passed, and that before the writ was issued the plaintiffs had been given notice that a meeting was to be called at which such resolution was to be proposed. They further asked that the proceeds of sale of the *Zafiro* be paid out to them after the satisfaction of the claim of the owners of the *Pinewood* in the collision action.

H. V. Brandon for the defendants. The plaintiffs knew that a proposal was to be made to wind up the defendant company because they had received notice of the resolution. They then attempted to gain priority over other creditors by arresting the *Zafiro* under the provisions of the Administration of Justice Act, 1956. If they had commenced their action before receiving notice of the resolution they would have acquired the status of secured creditors and would have been entitled to the benefit of that status, but, having begun their action with notice of the resolution, they should not be treated as secured creditors and should not be given priority over the rank and file of other creditors. On a winding up, the assets of the company should be distributed rateably between the creditors unless they have put themselves in the position of secured creditors before the operative date.

Section 228 of the Companies Act, 1948, relates to the avoidance of attachments, sequestrations, distress and executions against a company after the commencement of a compulsory winding up. It has been held that the arrest of a ship is a sequestration within the meaning of this section: *In re Australian Direct Steam Navigation Co.*[2]

Section 325 provides that, in any winding up, a creditor cannot retain the benefit of an execution if he has not completed it before the commencement of the winding up, or, if he has notice of a resolution for a voluntary winding up, before such notice. The definition of "goods" in this section clearly covers a ship, and the definition of "sheriff" clearly covers the Admiralty

[2] (1875) L.R. 20 Eq. 325.

Marshal, as an officer empowered to execute process. The arrest of a ship is clearly a process.

It is submitted that it is the general practice of the court to stay all actions against a company after the commencement of a voluntary winding up, and that this practice is only departed from in exceptional circumstances: *Harrison* v. *Mortgage Insurance Corporation*[3]; *Anglo-Baltic and Mediterranean Bank* v. *Barber & Co.*[4] Where a creditor has notice of a meeting at which a resolution for voluntary winding up is to be proposed, he cannot have the benefit of execution against the company's goods unless the execution is completed before such notice. The question is to what extent the issue of a writ in rem and the arrest of a ship constitutes a special reason or special circumstance which would prevent the operation of the general rule of staying actions.

It is conceded that, if those steps had been taken before the notice of the meeting had been given, they would constitute special circumstances: *The Cella.*[5] That decision is binding authority, where the facts are the same, and subject to the effect of subsequent statutes, that the plaintiff becomes a secured creditor. In the present case, however, the facts are different and it is submitted that the legislature has diminished the right of creditors to benefit from execution. Section 325 of the Companies Act, 1948, applies in terms to this case and in effect overrules *The Cella.*[5]

If the process of arrest of the ship amounts to the issue of execution against the goods of the company, the execution was not completed before the commencement of the winding up or, a fortiori, not before the notice of the meeting at which the resolution for voluntary winding up was to be proposed. It is true that there is nothing in the wording of section 325 to suggest an action in rem, but the words are wide enough to cover it and, in view of the policy of the provision, it is difficult to see why it should not be included. There is no definition of "execution" in the Companies Act, 1948, but it is defined in Halsbury's Laws of England, 3rd ed., vol. 16, p. 2, as "the enforcement of or "giving effect to the judgments or orders of courts of justice." It is submitted that the "issue" of execution is the arrest of the ship, while "completion" occurs when the order is made for final payment out. The Rules of the Supreme Court contain a narrower definition which does not cover process in rem: see

[3] (1893) 10 T.L.R. 141.
[4] [1924] 2 K.B. 410.
[5] (1888) 13 P.D. 82.

1959

THE ZAFIRO.

R.S.C., Ord. 42, r. 8 (Annual Practice (1959), p. 1005). But the Rules are designed for special purposes and Order 42 does not cover actions in rem.

Admiralty actions are just as much subject to the overriding effect of the Companies Act, 1948, as is any other type of action: *In re Australian Direct Steam Navigation Co.*[6] The arrest of the *Zafiro* by the plaintiffs is therefore bad: *In re Rio Grande do Sul S.S. Co.*,[7] *per* James L.J.

There is a proviso in subsection (1) (*c*) of section 325 giving the court an unfettered discretion to set aside the right conferred by the subsection on the liquidator, but it is submitted that this discretion ought not to be exercised so as to depart from the almost invariable practice in a case where the arrest takes place after notice of a meeting at which a voluntary winding up is to be proposed, because to do so would be contrary to the spirit of the section. There are three possible types of case: first, where the arrest of the ship takes place before the creditor has notice of the meeting; secondly, where the arrest takes place after the passing of the resolution to wind up the company; thirdly, as in the present case, where arrest takes place between the notice of the meeting and the passing of the resolution to wind up. In the first type of case, section 325 applies, but the court's discretion should be exercised in favour of the creditor. The second type of case is at the other end of the scale, and the creditor should not be allowed to continue his action. The third type of case is between the two extremes and, having regard to the policy and intention of section 325, the creditor ought not to have the benefit of his arrest, and his action should be stayed. [Reference was also made to *In re Ford, Ex parte The Trustee.*[8]]

Gerald Darling for the plaintiffs. Necessaries men are entitled to ask for equitable treatment because by the exercise of their calling they are keeping shipping in operation; they take risks in the public interest. By the Administration of Justice Act, 1956, s. 1, they are entitled to exercise their claims in rem against a ship. They are entitled to the ship as security and rank with other creditors who have proceeded properly in Admiralty: see *Dapueto* v. *Wyllie, The Pieve Superiore.*[9]

In *In re Australian Direct Steam Navigation Co.*[10] it was held that the arrest of a ship was a "sequestration," not an

[6] L.R. 20 Eq. 325.
[7] (1877) 5 Ch.D. 282.
[8] [1900] 2 Q.B. 211; 16 T.L.R. 399; 48 W.R. 688; 7 Mans. 281.
[9] (1874) L.R. 5 P.C. 482; 22 W.R. 777; 2 Asp.M.L.C. 319.
[10] L.R. 20 Eq. 325.

"attachment" or "execution." Section 228 of the Companies Act, 1948, which deals with compulsory winding up, includes both the words "execution" and "sequestration," but section 325 in careful terms refers only to "attachment" and "execution." An arrest is for the purpose of obtaining security and cannot be said to be an execution, which is giving effect to a judgment and only commences after judgment. *The Cella*[11] is still good law and a man who arrests the ship is a secured creditor. Section 325 does not apply to this case. The fact that the plaintiffs alone have acted promptly to secure their rights is a good reason for giving them the benefit of their action. Therefore, even if section 325 did apply to this case, the court should exercise its discretion in favour of the plaintiffs. Effect should be given liberally to the right conferred upon necessaries men by statute: see *Dapueto* v. *Wyllie, The Pieve Superiore.*[12] He is entitled to exercise those rights by arresting the ship: see *In re Rio Grande do Sul S.S. Co.*[13]

Brandon in reply. An arrest in these circumstances is not ipso facto void, but it is submitted that the court should produce the same result by staying proceedings in order to obtain a distribution of the assets pari passu. No special circumstances are involved in issuing a writ in rem after the commencement of winding up such that the court should depart from its usual practice of ordering a stay. The difference between a compulsory and a voluntary winding up is in form and not in substance: see *Westbury* v. *Twigg.*[14] The principle is the same in both cases. In the case of a writ issued after notice of a resolution for winding up, the court has discretion to stay the action and should exercise that discretion.

Cur. adv. vult.

May 6. HEWSON J. delivered the following judgment, in which he stated the facts and continued: Mr. Brandon, for the defendants, submitted that if the plaintiffs had begun their action before the notice of the proposed meeting the plaintiffs would have acquired the status of secured creditors, but that having begun their action, by issue of a writ in rem for the arrest of the ship, after they had received such notice, they should not be regarded as secured creditors so as to get priority over other creditors. On the contrary, they should be in the same position

[11] 13 P.D. 82.
[12] L.R. 5 P.C. 482.
[13] 5 Ch.D. 282.
[14] [1892] 1 Q.B. 77; 40 W.R. 208.

1959

THE ZAFIRO.

Hewson J.

as other unsecured creditors and take their share of the available fund rateably with them. As this is a limited company, presumably owning property other than the *Zafiro*, it is possible that the total fund available for distribution will considerably exceed the fund arising out of the sale of the *Zafiro*.

In support of Mr. Brandon's argument I was referred to various sections of the Companies Act, 1948.

Section 211 provides: "The winding up of a company may "be either—(*a*) by the court; or (*b*) voluntary; or (*c*) subject to "the supervision of the court"; and subsection (2) says: "The "provisions of this Act with respect to winding up apply, unless "the contrary appears, to the winding up of a company in any of "those modes."

Section 226, which applies to companies being wound up by an order of the court, gives a discretion to the court, on the application of the company or any creditor or contributory, to stay proceedings at any time between the presentation of a winding-up petition and before a winding-up order is made.

It was argued by the defendants that the presentation of a petition is analogous to notice of creditors' meeting in the case of a voluntary winding up, to which procedure I shall shortly refer.

Neither counsel argued that section 228 (to which I shall next refer) had any bearing on the present case, the present case being one of a voluntary winding up by the creditors. Section 228 provides that in the case of a compulsory winding-up order in respect of any company registered in England "any attachment, "sequestration, distress or execution put in force against the "estate or effects of the company after the commencement of "the winding up shall be void."

I was referred in the course of argument to *In re Australian Direct Steam Navigation Co.*,[1] where it was held that the arrest of a ship in the Admiralty Division was a sequestration within the meaning of section 163 of the Companies Act, 1862. That section is almost similar in wording to section 228 of the 1948 Act, except that the earlier Act was not confined to a company registered in England. In *In re Australian Direct Steam Navigation Co.*[2] Jessel M.R. held that the term "sequestration" had no particular technical meaning, but simply meant the detention of property by a court of justice for the purpose of answering a demand which is made, which is exactly what the arrest of a ship

[1] (1875) L.R. 20 Eq. 325. [2] Ibid. 326, 327.

is. If such an arrest was made after the winding-up order it was void under section 163 of the earlier Act.

I was then referred to section 229 of the Companies Act, 1948, which provides: " Where, before the presentation of a petition " for the winding up of a company by the court, a resolution has " been passed by the company for voluntary winding up, the " winding up of the company shall be deemed to have commenced " at the time of the passing of the resolution." Further in that section one sees this: " In any other case, the winding up . . . " by the court shall be deemed to commence at the time of the " presentation of the petition for the winding up."

Section 231 provides that in cases where there is a winding up by order of the court all actions are stayed except by leave of the court.

Then I was referred to certain sections dealing with voluntary winding up: section 278, which provides for voluntary winding up in various circumstances; section 283, which provides that voluntary winding up may be either a members' voluntary winding up or a creditors' voluntary winding up; and sections 292 to 300 inclusive, which contain provisions which apply to creditors' voluntary winding up, under which provisions the defendant company in this case was wound up and a liquidator appointed.

Section 280 provides that a voluntary winding up is deemed to commence at the time of the passing of the resolution.

Sections 301 to 310 contain provisions which apply to every voluntary winding up, and in particular I was referred to sections 302 and 307. Section 302 provides that, subject to certain preferential payments, the property of a company shall, on its winding up, be applied rateably in satisfaction of its liabilities; and, as I understand it, " preferential payments " there referred to includes secured creditors. Section 307 provides, inter alia, that the liquidator " may apply to the court to determine any question " arising in the winding up," and that " the court, if satisfied " that the determination of the question . . . will be just and " beneficial, may accede wholly or partially to the application on " such terms and conditions as it thinks fit or may make such other " order on the application as it thinks just." Mr. Brandon submitted that under this section the court has a discretionary power to stay an execution on the company's property, and with that submission I agree.

I now turn to section 325. [His Lordship read the section and continued:] It is not suggested that a ship is not a chattel personal, and Mr. Brandon argued that the Admiralty Marshal

1959

THE ZAFIRO.

Hewson J.

in the Admiralty Court is equivalent to a sheriff and that arrest by the Marshal comes under the heading "other process."

The last section to which I was referred was section 326, which sets out the duties of a sheriff regarding goods taken in execution. It provides that where goods "are taken in execu-"tion, and, before the sale thereof . . . notice is served on the "sheriff . . . that a resolution for voluntary winding up has been "passed, the sheriff shall, on being so required, deliver the "goods . . . to the liquidator"; and the section goes on to provide in subsection (3) that the rights of "the liquidator may "be set aside by the court in favour of the creditor . . . as the "court thinks fit." I am told by the defendants' counsel that the provisions of sections 325 and 326 came into force for the first time in 1929, except the subsections giving the court discretion, which appeared for the first time in the Act of 1948.

The defendants' main points, as I understood them, were these: first, that the general practice of the court was to stay all actions against a company after the commencement of the winding up and it could only be departed from in exceptional circumstances; secondly, that where a creditor has notice of the meeting at which the resolution for voluntary winding up is to be proposed he cannot have the benefit of execution against any of the company's goods unless execution is completed before such notice.

As to the first proposition, I was referred to several cases, two of which I am going to mention. The first one was *Harrison* v. *Mortgage Insurance Corporation*.[3] That was a case before a Divisional Court in which Wills J., after being referred to a number of cases establishing that it was a general rule to stay actions when a company was being wound up, whether voluntary or otherwise, agreed that it was so, and continued[4]: "If it was "quite clear that no creditor would be injured by the plaintiff "then obtaining execution, the action need not necessarily be "stayed, but in this case the rough probabilities appeared to be "the other way. The plaintiff could not be treated as a secured "creditor; there was not enough ground to say that he was such "at any place or time." Wright J. said[4]: "If the winding up "were for the benefit of the company and not in order to secure "equality to all the creditors, the matter would be different. "But if it were for the benefit of all the creditors prima facie "there ought to be a stay."

[3] (1893) 10 T.L.R. 141.

[4] Ibid. 142.

The second case to which I was referred was *Anglo-Baltic and Mediterranean Bank* v. *Barber & Co.*,[5] where Scrutton L.J. said [6] that "it is only in very special circumstances . . . that "the court will depart from its general practice of staying execu- "tion when the company is in voluntary liquidation, for the "reason that the execution, if allowed, would necessarily inter- "fere with the distribution of the assets pari passu." Atkin L.J., saying much the same thing, also referred [7] to the well-established practice and enumerated some exceptions to it—for example, if there had been some fraud or sharp practice—and he went on to say that there were possibly some other exceptions.

I accept that principle, with respect, remarking in passing that in neither of these cases, or in any case to which I was referred on this point, was the court considering, as one of the elements, the arrest of the vessel to secure a statutory lien.

The question was posed by counsel for the defendants (who, I should remark, admitted that he was in effect instructed by the liquidator) as to what extent a writ in rem and arrest of a vessel by a necessaries man constitute a special reason which prevents the application of the general rule. He admitted that if the issue of the writ and arrest had preceded the notice of the meeting, to which I have referred, then such special circumstances would have existed. But in this case the notice was served on January 22, 1958, and the writ was not issued, nor was the arrest made, until February 3, 1958. I agree with Mr. Brandon's submission that if the issue of the writ and arrest had preceded the notice I, at all events, would have exercised my discretion in favour of the necessaries man. I agree with that submission, for this reason, that, by arresting without having notice of the meeting he would have made himself a secured creditor under a statutory lien.

I was referred to *The Cella* [8] by both counsel. The facts in *The Cella* [8] were somewhat different from the case that I have to consider. The claim in *The Cella* [8] arose in the following way: The master of the ship, the *Cella*, gave a bill upon his owners for necessaries supplied to the ship by the plaintiff at Halifax, Nova Scotia, in January 1885. That bill was accepted, but it was later dishonoured. In June of the same year, whilst the *Cella* was under arrest at the instance of the master for wages and disburse- ments, the plaintiff, that is, the necessaries man, began an action

[5] [1924] 2 K.B. 410.
[6] Ibid. 418.
[7] Ibid. 419, 420.
[8] (1888) 13 P.D. 82.

1959

THE ZAFIRO.

Hewson J.

in rem against the ship; but a week later the mortgagee, one Wood, intervened. An agreement was made and embodied in an order of the court that the ship should be released, the mortgagee having undertaken to pay the plaintiff what he, the plaintiff, could, if the arrest continued, recover from the ship after satisfying all prior incumbrances. After a while the prior incumbrances were paid off and Wood was ordered to pay the balance into court, the balance being sufficient to cover the amount of the plaintiff's claim. Then on August 8, 1885, the owning company of the *Cella* was ordered to be wound up, and on August 13, 1885, the plaintiff brought his action against the owners on the bill, which had been dishonoured, and recovered judgment on the amount, which was never paid. In October of the same year the plaintiff brought an action against the master on the bill, and obtained judgment, of which he recovered only a small amount; and it was during this month of October that the liquidator of the company was appointed.

It will be seen that the order for winding up was made two months after the ship had been released against the mortgagee's undertaking. The plaintiff, by motion, applied for payment out. The liquidator opposed it because, among other reasons, he said the plaintiff was not a secured creditor, having no maritime lien, and had not obtained the leave of the Chancery Division to sue as he was obliged to do under the Companies Act of 1862, s. 87. That section provided: "When an order has been made for the "winding up of a company under this Act no suit, action or "other proceeding shall be proceeded with or commenced against "the company except with the leave of the court and subject to "such terms as the court may impose."

The Cella [8] was first heard by Hannen P., and he held that at the time the undertaking was given, which was in June, 1885, the plaintiff had a lien on the ship by virtue of the proceedings he had taken, that is, his action in rem. He had not a maritime lien; but he had a security for his money which arose at the commencement of the action in rem. In any event, the action was against Wood, the mortgagee, and not the ship or the company, and the President dismissed the liquidator's objections.

The case went to appeal, and Lord Esher M.R. said this [9]: "The judge is to enforce the writ, and to determine the rights "of the parties at the time the writ is served. That is so, as "it seems to me, in every action. But in every action we may

[8] 13 P.D. 82.

[9] Ibid. 87.

"have bankruptcy and I know not what intervening, so that "when judgment is given it cannot be effectually carried out. "But if the money be in court, or the court has possession of "the res, it can give effect to its judgment as if it had been "delivered the moment after it took possession of the res. It "is contrary to the principle of these cases and to justice that "the rights of the parties should depend not upon any acts of "theirs, but upon the amount of business which the court has "to do. Therefore the judgment in regard to a thing or to "money which is in the hands of the court, must be taken to "have been delivered the moment the thing or the money came "into the possession of the court." Then the Master of the Rolls went on, referring to Admiralty cases, which he said "are "undoubtedly based on the same rule as the two bankruptcy "cases, and they show that though there may be no maritime "lien, yet the moment that the arrest takes place, the ship is "held by the court as a security for whatever may be adjudged "by it to be due to the claimant." Fry L.J. says much the same thing,[10] and I will read only one sentence: "The arrest "enables the court to keep the property as security to answer "the judgment, and unaffected by chance events which may "happen between the arrest and the judgment."

Mr. Brandon submitted that *The Cella* [11] was binding on this court where the facts are the same and subject to the effect of subsequent statutes. He sought to distinguish the facts, and he also said that since *The Cella* [11] was decided in 1888 the legislature had cut down the rights of creditors to levy execution. Well, the facts are different in that, among other things, in *The Cella* [11] the writ and arrest were two months before the winding-up order, whereas in the present case the writ was issued 12 days after the notice of the proposed meeting. As I see it, *The Cella* [11]—I do not think it is contested—is still good law, that arrest in such cases creates a statutory lien, making the holder a secured creditor.

There is intervening legislation, and in particular there is section 325 of the Companies Act, 1948, to which I have already referred; but I am going to refer to certain parts of it again because what that section says is that where a creditor has issued execution and the company is subsequently wound up, he, that is, the creditor, shall not be entitled to retain the benefit of the execution against the liquidator unless he has completed the

[10] 13 P.D. 82, 88.

[11] 13 P.D. 82.

1959

THE ZAFIRO.

Hewson J.

execution before the commencement of the winding up, which in this case would be on receipt of the notice of the proposed meeting to consider the matter. The application of this section to the present case depends upon whether the arrest of the ship is to be regarded as any part of the execution. If it is, then the plaintiffs fail, unless under proviso (*c*) of section 325 I exercise discretion in their favour.

In the course of argument as to the meaning of the word "execution," I was referred, among other things, to Halsbury's Laws of England, 3rd ed., vol. 16, p. 2, where it says: "The "word execution in its widest sense signifies the enforcement "of or giving effect to the judgments or orders of courts of "justice. In a narrower sense, it means the enforcement of "those judgments or orders by a public officer under" various writs. I am not reading it all. I accept that definition, with respect, fortified, as I am, by certain passages in the Annual Practice (1959), where, on p. 991, is set out R.S.C., Ord. 42, r. 1, part of which reads as follows: "Where any person is by "any judgment or order directed to pay any money, or to deliver "up or transfer any property real or personal to another, it "shall not be necessary to make any demand thereof, but the "person so directed shall be bound to obey such judgment or "order upon being duly served with the same without demand." So it will be seen, therefore, that either the judgment or the order is for payment of money. The same order, rule 8, refers to the various writs of execution which give effect to those orders, but it will be seen that the execution follows either a judgment or an order for the payment of money. The arrest of a ship in an action in rem is the means whereby, among other things, a necessaries man obtains security for a debt of a special character without a judgment or order for payment of money. It is a right given to him by the legislature, a right the scope of which, in my view, has recently been extended by the Administration of Justice Act, 1956, s. 1 (1) (*m*),[12] and, while I am mentioning this Act, possibly also by (*p*).[12]

The special character of the debt, in my view, is that it is incurred by giving credit to the owners of vessels for the use of

[12] Administration of Justice Act, 1956, s. 1: "(1) The Admiralty "jurisdiction of the High Court shall "be as follows . . . jurisdiction to "hear and determine any of the fol-"lowing questions or claims . . . "(*m*) any claim in respect of goods "or materials supplied to a ship for "her operation or maintenance; . . . "(*p*) any claim by a master, shipper, "charterer or agent in respect of dis-"bursements made on account of a "ship; . . ."

those vessels. It is to be regarded in this way: it is the advancing of goods on credit to a ship which, in the ordinary course of business, moves away from the port of supply, to which it may or may not return. The goods have been supplied for the necessary use of the ship and for the purpose of the ship prosecuting its adventures, and, as I say, the ship may never return to that port again.

Mr. Brandon very strongly argued that an arrest such as this could be regarded as an anticipatory execution. As I see it, arrest is the means, given by law, whereby security is obtained for a debt of a special character, and, by so arresting, the necessaries man becomes a secured creditor. It seems to me (and I accept what Mr. Brandon says) that the wording of some of the sections I have referred to in the Companies Act is very inapt when applied to certain Admiralty matters; but I see no reason why I should extend the meaning of the word " execution " to include a writ in rem in the circumstances that we have to consider in this case. Execution, in my view, succeeds, and does not precede, judgment, whereas in arrest there is no existing judgment upon which to execute.

In *In re Australian Direct Steam Navigation Co.*,[13] to which I have already referred, it was held that the arrest in such circumstances was a sequestration. If it is that, it is not an execution because both of those words appear in section 228, which section both counsel have accepted as not applying to voluntary winding-up proceedings. They are used separately in that section and convey to me that they do not mean the same thing, and that " sequestration " is different from " execution." In section 325 of the same Act " execution " is the only one of those two words that is mentioned.

I have no doubt that under section 228 even a maritime lien (which, of course, is superior to a statutory lien) gives way to a court order for compulsory winding up if the arrest in respect of the maritime lien succeeds the order unless the court gives leave. It is difficult sometimes to speculate upon the reasons, but, quite apart from the fact that the general principle of the court is to enable unsecured creditors to obtain their portion rateably to what is owed to them, it may also be that one Division of this court is not to be set up in competition with the other, and where a court has ordered a company to be wound up it is not seemly to set another Division of the court in opposition to it. I have

[13] L.R. 20 Eq. 325.

1959

THE ZAFIRO.

Hewson J.

no doubt that section 228 of the Act does not apply to this case, and, from what I have said, in my judgment neither does section 325. Should I be wrong about that, I would still be left to exercise a discretion.

Mr. Brandon, in arguing on that limb of the case, put the position in three ways. He said that if the vessel was arrested before the receipt of the notice of the meeting he would accede to the exercise of the court's discretion in favour of the necessaries man. I have already dealt with that and I accept it. Then, secondly: if the arrest was after the resolution was passed, he submitted that the court should refuse to exercise discretion in favour of the necessaries man. Then, thirdly: if, as in this present case, the arrest came between the receipt of notice of the meeting and the passing of the resolution, the court should still refuse to exercise discretion in favour of the necessaries man and stay his action.

While I am not called upon to express any opinion on the second submission, I do not accede to the third submission, which covers the circumstances of this present case. The proposed meeting might never have taken place. It seems to me to be something quite different from a court order to wind up or a resolution to wind up, and I have to try and hold the balance. Necessaries men are given a right to secure the risks they take in catering for shipping, and if they exercise their rights without undue delay their rights to become secured creditors should be respected and enforced.

In my judgment I find that the plaintiffs in this action rightly, by the action they took, became secured creditors.

Mr. Brandon said that if I find the plaintiffs in this action to be secured creditors, as I do, he would not oppose payment out. I have had evidence to satisfy me that this debt of £239 16s. was incurred, and there has been no defence filed to it. I therefore give judgment in default for that amount and I order the payment out of that amount to the plaintiffs.

As to the remainder, I order the payment out of that amount to the company in liquidation.

Judgment accordingly.

Solicitors: *Edward & Childs; Bentleys, Stokes & Lowless.*

A. S-R.

FRANCIS *v.* FRANCIS.

1959
June 17.

Lord Merriman P. and Phillimore J.

Husband and Wife—Divorce—Paternity—Presumption of legitimacy—Adultery by wife and marital intercourse at time of conception—Husband using contraceptive sheaths.

Infant—Custody—Presumption of legitimacy—Use of contraceptive sheaths.

A wife applied to the justices for an order in respect of a child born to her during the marriage and conceived at a time when she was having sexual connection not only with her husband but with an adulterer. The husband, however, was acknowledged by the wife to have been using contraceptive sheaths throughout the relevant period, and she had at first accepted, as well as her husband, that the child was the adulterer's, and had left the name of the father blank when she registered the birth. There was no evidence that contraceptive sheaths were infallible, but the justices, observing that although a sheath might be defective, or might not be used correctly, such an occurrence was unlikely to have happened without either of the parties being aware of it, or at least of the possibility of something untoward having occurred, held that they were satisfied beyond reasonable doubt in all the circumstances that the child was the adulterer's. The wife appealed:—

Held, that the use of contraceptives by the husband at the time of conception did not rebut the very strong presumption of legitimacy, which rightly stood to cover the interests of the child, who must, accordingly, be taken to be legitimate.

Watson v. *Watson* [1954] P. 48; [1953] 3 W.L.R. 708; (sub nom. *W.* v. *W.*) [1953] 2 All E.R. 1013 approved.

Observations and citations in *Cotton* v. *Cotton* [1954] P. 305, 310, 311; [1954] 2 W.L.R. 947; [1954] 2 All E.R. 105 applied.

Appeal by wife from the justices for the petty sessional division of Eastleigh sitting at the Hampshire County Buildings, Southampton, on March 11, 1959.

On July 27, 1958, the wife, who had previously given birth to two children of the marriage as to whose legitimacy there was no dispute, gave birth to a child D. At the material time for conception the wife was committing adultery with one "Ernest." She admitted this adultery to her husband, who had himself been discovered by her in the act of adultery; but the parties continued to sleep together, and to have marital intercourse, as they had done before, and it was accepted that the wife's adultery had been condoned. The husband, however, used a contraceptive sheath on each occasion of marital intercourse during the relevant period.

1959

FRANCIS v. FRANCIS.

On February 16, 1959, after the parties had separated, a summons was issued upon the complaint of the wife that her husband had been guilty of desertion, of a wilful neglect to provide reasonable maintenance for herself and her three infant children, and of adultery with another woman with whom the husband was alleged to have gone to live; and she asked for an order for the custody of the three children, and for maintenance for the children and herself.

On March 11, 1959, the justices made an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, on the grounds of desertion and neglect to maintain, but for reasons not stated by them made no finding upon the complaint of adultery. They ordered the husband to pay to the wife the weekly sum of £3 and to pay further weekly sums of 30s. for the maintenance of the two older children, the custody of whom was given to the wife. They refused, however, for the reasons set out below, to make any order in respect of the child D., whom they concluded not to be a child of the marriage.

At the hearing before the justices, at which the husband neither attended nor was represented, the wife, who was represented by counsel, gave positive evidence that her husband used contraceptive sheaths during the period relevant to the conception of the child D., and said that when she had told her husband of her pregnancy, and he had denied responsibility, she had accepted the fact that "Ernest" was the father; and when registering the birth she had left the name of the father blank.

The wife appealed against the refusal by the justices to make any order in relation to the child D. No other question relating to their decision was raised by either party.

The justices, after referring to the nature of the complaint and to the order which they had made, stated upon the appeal that they had made no order in respect of the child D. because they had reached the conclusion that she was not a child of the marriage. They gave the following reasons for their decision:

"(1) The appeal in this case is limited to the question as to "whether we were correct in not making an order in respect of "the youngest child D., and our reasons are therefore confined "to that aspect of the case.

"(2) In this case we only heard the evidence of the wife "and it was obvious that the evidence given was frank and "honest. In reaching our decision we were therefore largely "concerned in considering the effect of that evidence in the light

" of the cases to which we were referred. We were referred to " the following cases: *Watson* v. *Watson* [1]; *Cotton* v. *Cotton*.[2]

" (3) The child D. was born on July 27, 1958, and at the time " when she was conceived it appears that the wife was having " sexual intercourse with a man named Ernest. It was also " stated by the wife that her husband used contraceptives of the " sheath type.

" (4) When the wife found that she was pregnant her husband " denied that the child was his and the wife thereupon accepted " the fact that the man Ernest was the father; and indeed when " she registered the birth she left the portion relating to the " father blank. The wife did state at the end of her evidence " ' You cannot always rely on these contraceptives,' but this did " not apparently affect her opinion at the time when the child " was born; and without detracting in any way from our view " as to the honesty of her evidence, it may be that she is now " influenced by her knowledge of the authorities which were " quoted to us. The letters [two exhibits] are letters from the " husband to the wife in which he refers to his two children and " to the presents he gave to them. It seems from the style of " those letters that there was no question in the mind of the " husband as to whether he was the father of the third child and " this attitude does not appear to have evoked any protest from " the wife even at that stage.

" (5) It seemed to us that this acceptance of Ernest as the " father was important; and although it is true that a contra- " ceptive of the sheath type might be defective, or might not be " used correctly, such an occurrence is unlikely to have happened " without either party being aware of what had happened, or " at least being aware of the possibility of something " untoward having occurred. In these matrimonial cases we do " often see women of very dull intelligence of whom a great deal " cannot be expected, but the wife in this case was an intelligent " woman who might be expected to notice any such untoward " occurrence.

" (6) The authorities quoted to us were cases where the issue " as to paternity was specifically tried, and we considered whether " the position was altered in a case such as this where we were " asked to make an order. That is to say whether it was open " to us to refuse the order in respect of this child on the grounds

[1] [1954] P. 48; [1953] 3 W.L.R. 708; (sub nom. *W.* v. *W.*) [1953] 2 All E.R. 1013.

[2] [1954] P. 305; [1954] 2 W.L.R. 947; [1954] 2 All E.R. 105.

1959

FRANCIS v. FRANCIS.

" that we were merely not satisfied that the child was a child " of the marriage. It appeared, however, that the presumption " as to legitimacy was such that the child must be treated as a " child of the marriage unless it was proved to us that the child " was illegitimate. We therefore considered the question in that " light.

" (7) A part of the headnote of *Watson* v. *Watson*[3] was " quoted to us from the All England Reports and reads as follows: " ' . . . Nothing except evidence that the husband did not have " ' sexual intercourse with the wife at the period of conception " ' could render illegitimate a child born in wedlock, and the " ' mere use of contraceptives did not alter that proposition . . .' " The headnote did not in our view correctly state the effect of " the judgment. It seems from the two recent cases that we " must be satisfied beyond reasonable doubt, that is to say, be " sure, that the child is illegitimate; but we do not believe that " we are so limited as it is suggested in the headnote. It appears " that if we apply the proper standard of proof, and we are then " sure upon the evidence we have heard that the child is illegiti- " mate, we must refuse to make the order applied for and there " is no requirement that we can only reach such a decision upon " specified evidence as is suggested in the headnote.

" (8) It is however proper that we should look at the cases " of *Watson* v. *Watson*[3] and *Cotton* v. *Cotton*[4] in order to see " the type of evidence which was considered insufficient and the " reasons which were given. Counsel for the wife did suggest " to us that the facts in these cases were so similar to the facts " in this case that we were unable to do other than to reach a " decision that the child was legitimate. There are, however, " some distinctions, and we do not feel that this is correct. In " *Watson* v. *Watson*[5] contraceptives were used; but the judgment " mentions that at the time the husband did not doubt that he " was the father of the child, and in relation to the admissions " made by the wife that the co-respondent was the father of the " child the judge stated[6]: ' I do not think that such statements, " ' more especially coming from the woman I know her to be, a " ' woman utterly regardless of the truth, who would say any- " ' thing to suit her own purpose, whatever that might be at the

[3] [1954] P. 48; [1953] 2 All E.R. 1013. The relevant passage in the headnote of the Law Reports reads: " The mere use of contraceptives by " spouses at the time the wife con- " ceives does not rebut the presump- " tion in favour of legitimacy."

[4] [1954] P. 305.

[5] [1954] P. 48.

[6] Ibid. 54.

" ' moment, are sufficient to rebut the presumption of law in " ' favour of legitimacy.' In *Cotton* v. *Cotton* [7] there was a con- " flict of evidence between the husband and wife as to whether " intercourse had taken place or not. After referring to the " evidence, Singleton L.J. stated [8]: ' It was for the commissioner " ' to determine whether or not he could accept it as the measure " ' of proof required in a case of this kind.' Later in the judg- " ment, Singleton L.J., after stating that the measure of proof " in a matter of that kind was indeed strict and after stating that " in that case that measure of proof was not attained, went on to " say [9]: ' It would not help anyone if I, or any other member " ' of this court, expressed a view as to the conclusion which we " ' might have reached if we had seen the witnesses and had " ' heard what they had to say. It was a question for the judge " ' of the first instance.'

" (9) It appeared in the light of the above that it was open " to us to consider the facts of the particular case before us and " to consider whether it was proved that the child was illegiti- " mate. It further appeared to us that in considering this question " we had to apply the same standard of proof as would be required " in a criminal case. In *Miller* v. *Minister of Pensions* [10] Denning " J., speaking of the degree of cogency which the evidence on a " criminal charge must reach before the accused can be convicted, " said [11]: ' That degree is well settled. It need not reach cer- " ' tainty, but must carry a high degree of probability. Proof " ' beyond reasonable doubt does not mean proof beyond the " ' shadow of a doubt. The law would fail to protect the com- " ' munity if it admitted fanciful possibilities to deflect the course " ' of justice. If the evidence is so strong against a man as to " ' leave only a remote possibility in his favour, which can be " ' dismissed with the sentence " of course it is possible, but not " ' " in the least probable," the case is proved beyond reasonable " ' doubt, but nothing short of that will suffice.' In *Reg.* v. " *Hepworth & Fearnley* [12] Goddard C.J. said [13]: ' One would be " ' on safe ground if one said in a criminal case to a jury: " You " ' " must be satisfied beyond reasonable doubt " and one could " ' also say " You, the jury, must be completely satisfied " or " ' better still, " You must feel sure of the prisoner's guilt." '

[7] [1954] P. 305.
[8] Ibid. 309.
[9] Ibid. 310.
[10] [1947] W.N. 241; 63 T.L.R. 474; [1947] 2 All E.R. 372.
[11] 63 T.L.R. 474.
[12] [1955] 2 Q.B. 600; [1955] 3 W.L.R. 331; [1955] 2 All E.R. 918.
[13] [1955] 2 Q.B. 600, 603.

1959

FRANCIS v. FRANCIS.

"(10) In connection with the case before us we have mentioned certain factors in paragraphs (3), (4) and (5) which were of course brought out in evidence by the wife against her own interests. We did consider the matter carefully and at some length, and we did feel sure that the child D. was in fact illegitimate. We felt that the wife herself had been satisfied that this child was the child of the man Ernest; and the facts mentioned in paragraphs (3), (4) and (5) above, and the whole tenor of the wife's evidence, led us to our conclusion."

K. C. L. Smithies for the wife appellant. Where the legitimacy of a child is disputed on the ground that the husband is not the father, "the question cannot be decided upon a mere "balance of probabilities": *per* Luxmoore J. in *In re Bromage, Public Trustee* v. *Cuthbert (Infant) and Others*,[14] which was approved by the Court of Appeal in *Cotton* v. *Cotton*.[15] The presumption of legitimacy "is not lightly to be repelled. It is "not to be broken in upon, or shaken by a mere balance of "probability; the evidence for the purpose of repelling it must "be strong, distinct, satisfactory and conclusive": *per* Lord Cottenham L.C. in *Morris* v. *Davies*,[16] whose words were cited in Luxmoore J.'s judgment[17] and applied in *Cotton* v. *Cotton*.[18] In *Cotton* v. *Cotton*[19] the parties had been sleeping in the same bed at the time of conception, and although the husband had nonetheless denied having had marital intercourse at the material time, and although the commissioner had considered the wife an unreliable witness, and had been "more than suspicious" that the child was the child of the co-respondent, he had not been satisfied that the presumption of legitimacy had been rebutted; and the Court of Appeal approved the principles of law which the commissioner had applied to the facts before him.

It is clear from the wife's evidence before the justices in this case that her adulterous intercourse might well have resulted in the birth of the child, but to rebut the presumption of legitimacy it must be shown that the husband did not have sexual intercourse which might have had that result: *Gordon* v. *Gordon and Granville Gordon*.[20] Although the wife was having intercourse with the husband at the material time, such intercourse was with

[14] [1935] Ch. 605, 611; 51 T.L.R. 408.
[15] [1954] P. 305.
[16] (1836, 1837) 5 Cl. & Fin. 163, 265.
[17] [1935] Ch. 605, 611.
[18] [1954] P. 305, 311.
[19] [1954] P. 305.
[20] [1903] P. 141.

sheath contraceptives. In *Watson* v. *Watson*,[21] however, which was cited with approval in *Cotton* v. *Cotton*,[22] Barnard J. decided that evidence that the marital intercourse which took place at the relevant time was with rubber sheaths did not displace the presumption of legitimacy. His Lordship appeared to be of the opinion that nothing less would suffice than evidence that no marital intercourse of any kind took place. It might well be objected that Barnard J. was not laying down any general rule. He adverted to the fact that the husband in that case had originally accepted the child as his, not knowing until some two years later that his wife had been having sexual intercourse with another man, as well as himself, at the material time, and that a previous attempt to prevent conception, albeit by using pessaries, had been unsuccessful. In the present case the husband disclaimed responsibility for conception as soon as he learnt of the pregnancy, and the wife seemed to accept that he was not responsible. But it is submitted that the views held by the parties are not strictly relevant upon an issue of this nature.

It is, however, submitted in any event that unless there is evidence that the particular type of contraceptive used, and its mode of user, were such as to render conception virtually impossible, evidence merely that marital intercourse at the material time was with sheath contraceptives is not sufficient in law to displace the presumption of legitimacy.

[Reference was also made to the rule in *Russell* v. *Russell* [23] and its abolition in the Law Reform (Miscellaneous Provisions) Act, 1949 (now section 32 (1) of the Act of 1950).]

[He was stopped.]

The husband in person.

LORD MERRIMAN P. referred to the nature of the appeal and said that the justices, in a very careful and closely reasoned judgment, had come to the conclusion that they were entitled, if not bound, to find that the child was illegitimate, and that it was solely for that reason that they had declined to give custody of that child to the wife, in whose care the child was, and had, accordingly, disabled themselves from making any order for the payment of maintenance for the child. His Lordship continued: The evidence was that the wife had, on her own confession, committed adultery with another man. She said she was provoked by

[21] [1954] P. 48.
[22] [1954] P. 305, 309.
[23] [1924] A.C. 687; 40 T.L.R. 713.

1959

FRANCIS v. FRANCIS.

Lord Merriman P.

the fact that she had caught her husband in the act of adultery with another woman (not the woman with whom he is living now), and she says that this (though we do not have to inquire into this on this appeal) was the matter which conduced to her own adultery with this named man. There being no doubt, as I understand it, that it would have been physically and medically possible for that man to be the father of the child, it is nevertheless the fact that her adultery having been discussed between her and her husband—and, incidentally, the adultery in the act of committing which she had caught him—they nevertheless went on sleeping together at the material time so far as the conception of this child was concerned. But let this be said in the husband's favour, that the wife gave positive evidence, which she made more positive still when she was asked the specific question by the court, that each time she and her husband had had sexual intercourse at the material time that her husband had used contraceptives, and by referring back to the early part of her evidence she was plainly referring to sheath contraceptives. I am taking this on the basis that it was established in the husband's favour that at the material time he was using rubber sheaths in sexual intercourse with his wife.

On that the magistrates have held in a reasoned decision, on the basis of two cases to which I will refer in a moment, that they ought to find, and that they were entitled to find, that this child was illegitimate.

I have come to precisely the opposite conclusion as a matter of law, because I think that the justices have misdirected themselves on this point, and I think really that the matter, particularly in relation to the use of rubber sheaths, is concluded by the Court of Appeal's approval in *Cotton* v. *Cotton* [1] of the decision in *Watson* v. *Watson* [2] by Barnard J., who said, with reference to a case in which the principal issue was the use of rubber sheaths [3]: "If I had to decide this merely on a balance of probability I "would decide in the husband's favour" (meaning that the child was illegitimate), "but in face of the presumption of law which "means that he must satisfy me beyond all reasonable doubt, I "feel that he has not displaced the presumption. I therefore "decide the issue in favour of the wife"—that is, in favour of the child's legitimacy.

[1] [1954] P. 305.
[2] [1954] P. 48.
[3] Ibid. 55.

1959

FRANCIS v. FRANCIS.

Lord Merriman P.

In this case there is, I think, no doubt that the parties certainly accepted the probability that this child was the child of the adulterer and not of the husband, and, in a word, the question is whether that is good enough. Against that, of course, one has to take a sentence or two in the wife's evidence when, in answer to the court when she was pressed about this statement of hers about the habitual use of sheath contraceptives, she said, first of all, "You cannot always rely on these contraceptives," and, secondly, "I cannot tie down who the father is." That was said rather in the context that when she came to register the birth she left the name of the father blank. There is no doubt, I think, that between themselves the parties had accepted the probability that the child was, or certainly might be, the child of the man with whom the wife had committed adultery.

But in *Cotton* v. *Cotton*[4] the Court of Appeal, adopting as they did[5] in a similar case the passage which I have read from Barnard J.'s judgment, emphasised[6] the words of Lord Cottenham L.C. in *Morris* v. *Davies*[7]: "The evidence must be such as "to exclude all doubt, that is, of course, all reasonable doubt, in "the minds of the court or jury to whom that question is sub-"mitted." Now, those words of Lord Cottenham L.C. are taken from the quotation of them by Luxmoore J. in *In re Bromage, Public Trustee* v. *Cuthbert (Infant) and Others*,[8] where they are followed by a quotation from the opinion of Lord Lyndhurst in the same case[9]: "That presumption of law is not lightly to "be repelled. It is not to be broken in upon, or shaken by a "mere balance of probability; the evidence for the purpose "of repelling it must be strong, distinct, satisfactory and "conclusive."

It is upon that basis that I think we are bound to hold here that there was no such repelling of the legal presumption, and that this child, actually born in wedlock, must be taken to be legitimate.

The result of that is, I think, that the only ground on which no custody order was made for this child being this finding of illegitimacy, we ought to vary the justices' order by adding that the wife should be given the custody of this child. We have not, of course, the child represented before us. If we had had any doubt about the propriety of the decision at which we are arriving, with

[4] [1954] P. 305.
[5] Ibid. 310.
[6] Ibid. 311.
[7] 5 Cl. & Fin. 163, 215.
[8] [1935] Ch. 605, 611.
[9] 5 Cl. & Fin. 163, 265.

1959

FRANCIS v. FRANCIS.

Lord Merriman P.

which I have reason to believe my brother agrees, we should certainly have taken steps before coming to an opposite conclusion to have the child independently represented. But having regard to the conclusion at which we have arrived, there is no need, in our opinion, to do so.

As I have already said, the mother has the child in her care at the moment. She is obviously the proper custodian, and in the child's interest it is plain that some proper custodian should be appointed, and it seems to me the inevitable conclusion that we must give the mother the custody.

There then remains the point about which the husband is more particularly anxious. I have said that he was not represented in the court below when an order for £3 for the wife and 30s. each for the two elder children was awarded to her, together with the custody of those children. That is £6 in all as things stand, and apparently he has already run into trouble, because the wife has taken enforcement proceedings, under which he has been ordered to pay within a month and pay off the arrears at 10s. a week. We are not dealing with those proceedings at all, but if the justices are asked to make any maintenance order in respect of the child of whom the wife is given custody by this court, they will, no doubt, take into account what the state of the husband's finances may be, and if he is really and truly unable to pay the existing order (and, of course, it must be remembered that rightly or wrongly he has placed upon himself the burden of supporting another household), they will take those facts into account and do whatever may be just in the circumstances. It is not for us to order or to suggest either the award of any particular amount, or that no amount should be awarded, nor even to say that a nominal amount should be awarded. That is a matter for the justices themselves.

I propose that we vary the justices' order by giving the custody of the child to the wife for the reasons that I have given.

PHILLIMORE J. I agree, and I would only add a word out of deference to the decision of the justices and the very careful assessment of their reasons which we have had put before us.

As my Lord has said, where a child is born in wedlock, there is a presumption that it is a child of the two spouses, and that is a presumption which is not lightly to be dispelled. In this case I think that the justices felt that both spouses were, and certainly that the husband was, of the opinion that this child was not the child of the husband but was the child of another

man; and the fact that the parties took this view weighed heavily with the justices, more especially as the wife herself admitted that whenever she and her husband had had intercourse he had used contraceptives. I think that the justices, thinking as they did that both the husband and the wife believed that the child was not the child of the husband, and thinking that it was rendered all the more unlikely by the fact that the husband had used contraceptives, came to the conclusion that this entitled them to find that the presumption had been dispelled.

In my judgment that was clearly wrong. Whether one chooses to call the measure of proof which has to be adduced "strong," "distinct, satisfactory and conclusive" or to use Singleton L.J.'s word "strict,"[10] it must be wrong where a woman, albeit committing adultery, is every night sharing a bed with her husband, and from time to time having intercourse with him, although he may use contraceptives, to suggest that a child born in those circumstances can safely be said to be a child of the other man, or that there is evidence to rebut the very strong presumption which rightly stands to cover the interests of the child.

I take the words of Sir Francis Jeune P., quoted by Barnard J. in *Watson* v. *Watson*,[11] to which my Lord has referred. Sir Francis Jeune P., giving judgment in *Gordon* v. *Gordon and Granville Gordon*,[12] said this: "If the husband could, from the "circumstances of time, place, and health, have had nuptial "intercourse with his wife, and there be no evidence to prove "that he did not have such intercourse, he must be considered "the father of her child, even if she had committed adultery "with one, two or twenty other men."

Well, here was a husband who at the material time when this child was conceived was sharing a bed with his wife and having intercourse with her, albeit using contraceptives. In such circumstances, in my judgment, the presumption in favour of the child's legitimacy is not dispelled, and this child must be treated as the child of the husband in this case.

For these reasons I agree with the course my Lord proposes.

Appeal allowed: order varied and case remitted to the justices to determine maintenance.

Solicitors: *Hewitt, Woollacott & Chown for Page, Gulliford & Gregory, Southampton.*

J. B. G.

[10] [1954] P. 305, 311.
[11] [1954] P. 48, 54.
[12] [1903] P. 141, 143.

1959
Sept. 17.

Winn J.

WINSTONE *v.* WINSTONE.

Husband and Wife—Divorce—Expedition—Jurisdiction to grant interim relief—Originating summons by wife for leave to present petition within three years of marriage—Determination on summons adjourned sine die—Injunction sought to restrain husband from interfering with occupancy of matrimonial home—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 2—*Matrimonial Causes Rules*, 1957 (*S.I.* 1957, *No.* 619), *r.* 2—*Supreme Court of Judicature (Consolidation) Act*, 1925 (15 *& 16 Geo.* 5, *c.* 49), *s.* 45.

Practice and Procedure—Writ—Leave to issue—Position pending leave—Application for interim relief—Injunction—Jurisdiction—Supreme Court of Judicature (Consolidation) Act, 1925, *s.* 45.

Injunction—Interlocutory—Jurisdiction to grant—Position pending leave to bring proceedings—Supreme Court of Judicature (Consolidation) Act, 1925, *s.* 45.

A wife who had been married for less than three years sought leave by originating summons, pursuant to section 2 of the Matrimonial Causes Act, 1950,[1] and rule 2 of the Matrimonial Causes Rules, 1957,[2] to present a petition for the dissolution of the marriage. While the decision on her summons stood adjourned she applied to the Vacation Court for an injunction to restrain her husband from interfering with her occupancy of the matrimonial

[1] Matrimonial Causes Act, 1950, s. 2: "(1) No petition for divorce "shall be presented to the court "unless at the date of the presentation of the petition three years have "passed since the date of the marriage: Provided that a judge of the "court may, upon application being "made to him in accordance with "rules of court, allow a petition to "be presented before three years have "passed on the ground that the case "is one of exceptional hardship "suffered by the petitioner or of "exceptional depravity on the part "of the respondent. . . . (2) In "determining any application under "this section for leave to present a "petition before the expiration of "three years from the date of the "marriage, the judge shall have "regard to . . . the question whether "there is reasonable probability of a "reconciliation between the parties "before the expiration of the said "three years."

[2] Matrimonial Causes Rules, 1957, r. 2: "(1) An application for leave "to present a petition for divorce "before three years have passed since "the date of the marriage shall be "made by originating summons in "accordance with Form 1. (2) There "shall be filed in support of the "summons an affidavit by the applicant stating—(*a*) the grounds of "the application; (*b*) particulars of "the hardship or depravity alleged; ". . . (*e*) whether any, and if so "what, attempts at reconciliation "have been made; (*f*) particulars of "any circumstances which may assist "the court in determining whether "there is a reasonable probability of "reconciliation between the parties. ". . ."

R. 3: "(1) Every matrimonial "cause shall be commenced by filing "a petition addressed to the High "Court. . . ."

home. On a preliminary question as to the court's jurisdiction to make orders affecting the general matrimonial relations of parties when no petition had yet been, nor could be, filed:—

Held, that the court's jurisdiction under section 45 of the Supreme Court of Judicature (Consolidation) Act, 1925,[3] to grant injunctions was limited to making orders within the scope of the substantive relief sought in pending proceedings; and as the only proceedings here pending were those seeking leave to present a petition and the injunction sought was outside the scope of those proceedings, the court had no jurisdiction to entertain the application.

Aliter, where the wife had within three years of the marriage presented a petition for judicial separation for which no leave was necessary.

Per curiam. Where an individual is required by some statutory provision to obtain leave before he issues a writ, that individual cannot be regarded as having begun an action until he has, with the leave of the court, issued a writ.

Dicta in *Morgan* v. *Hart* [1914] 2 K.B. 183, 186 explained.

Silverstone v. *Silverstone* [1953] P. 174; [1953] 2 W.L.R. 513; [1953] 1 All E.R. 556 distinguished.

MOTION.

A wife applied by originating summons for leave to present a petition for divorce before three years had passed since the date of her marriage in accordance with the provisions of the Matrimonial Causes Act, 1950, s. 2, and the Matrimonial Causes Rules, 1957, r. 2. The originating summons came before Stevenson J. on July 28, 1959, and was adjourned sine die in order to give the husband an opportunity to file evidence in reply to the wife's affidavit.

On September 17, 1959, the wife applied to the judge in the Vacation Court, acting for the Probate, Divorce and Admiralty Division, for an interim injunction asking that cause might be shown why her husband should not be restrained from interfering with or molesting her in her occupancy of the matrimonial home at 7, Cleveland Gardens, London, W. The judge (Winn J.) asked counsel to defer consideration of the application on its merits in order that he might hear as a preliminary issue submissions as to

[3] Supreme Court of Judicature (Consolidation) Act, 1925, s. 45: "(1) The High Court may grant a "mandamus or an injunction or "appoint a receiver by an interlocu- "tory order in all cases in which it "appears to the court to be just or "convenient so to do. . . . (3) If, "whether before, or at, or after the "hearing of any cause or matter, an "application is made for an injunc- "tion to prevent any threatened or "apprehended waste or trespass, the "injunction may be granted, if the "court thinks fit, . . ."

1959

WINSTONE v. WINSTONE.

whether or not the court had jurisdiction to grant the interlocutory relief sought when no petition for dissolution of the marriage had yet been, nor could be, filed.

David Hunter for the wife. The proceedings before the court are those in the wife's originating summons for leave to file a petition for divorce; and no petition can be filed until leave has been obtained. But it is submitted as a preliminary point that the court's jurisdiction conferred by section 45 of the Supreme Court of Judicature (Consolidation) Act, 1925, to grant injunctions "in all cases" and in "any cause or matter" extends to the ancillary relief sought here. The words "in all cases" in subsection (1) mean "in every matter before the court," and the words "any cause or matter" in subsection (3) are equally apt to cover this originating summons. The predecessor to section 45 in the Judicature Act, 1873 (section 25 (8)), was considered in *Morgan* v. *Hart*,[4] when Buckley L.J. said that the section was procedural; that it did not entitle the court to grant injunctions where prior to the Act of 1873 they would not have been granted; but that it enabled the court to grant them "in any proceedings" without having to start separate proceedings for an injunction. Those wide words "in any proceedings," coupled with the words of the Act of 1925, cover this originating summons.

[WINN J. It is clear that once a petition for dissolution of the marriage or other matrimonial relief has been competently filed the Divorce Court would have jurisdiction. But since ex hypothesi Parliament has not seen fit to allow a petition to be filed in these circumstances without leave, I am troubled as to whether the court is sufficiently seised of the general matrimonial relations of the parties to assume this jurisdiction when no petition has been nor can be filed. In *Morgan* v. *Hart*[4] the ancillary relief sought was within the scope of the substantive relief sought by the writ. But is that the position here?]

It is well established that the Divorce Division can grant injunctions to restrain one party from the kind of molestation about which this wife seeks to complain today once a petition has been filed: see *Silverstone* v. *Silverstone*,[5] in which Pearce J. said that he had a discretion to restrain a husband from entering the matrimonial home when a wife's petition was pending, even though the husband owned the home. That shows that the object

[4] [1914] 2 K.B. 183, 186.

[5] [1953] P. 174, 176; [1953] 2 W.L.R. 513; [1953] 1 All E.R. 556.

of the relief and of the court's power to intervene on an interlocutory application is to protect the parties concerned in litigation so that pressure cannot be put on one or the other to prevent their coming before the court. [Rayden on Divorce, 7th ed., p. 435, was referred to.] It is submitted that when this wife put her originating summons on the file she became entitled to the protection of the court and brought herself within the general words of section 45 of the Act of 1925 and the dicta of Buckley L.J.

If the court has no power to prevent this husband from making life unpleasant for this wife, it reveals, as Pearce J. said, "a "serious and regrettable gap in the court's powers,"[6] particularly in the present case where the wife's summons was adjourned sine die at the beginning of the long vacation to enable the husband to file evidence in answer, and he has as yet not done so. An analogous situation, in which injunctions are regularly granted, is that on proceedings by originating summons under the Married Women's Property Act, 1882.

[WINN J. But those are to restrain dealings with property which is in dispute. They are within the scope of the substantive relief sought.]

The substantive relief sought is the dissolution of the marriage.

[WINN J. No; it is relief from the bar or impediment which Parliament has seen fit to impose in the first three years of a marriage. Is not there an analogy in the proceedings under the Lunacy Act and the Mental Deficiency Act where a person who wishes to complain of being detained cannot start an action until leave has been obtained from a judge in chambers? It could not be said that in such a case ancillary interlocutory relief could be obtained by the proposed plaintiff before permission has been obtained to issue a writ. Why could not this wife present a petition for judicial separation for which no leave is required or proceed under the Married Women (Maintenance) Act, 1949, for maintenance?]

There are difficulties in both those courses. If the court holds on this preliminary issue that it has no jurisdiction, leave is sought to restore the originating summons adjourned by Stevenson J. to this Vacation Court so that a decision may be obtained on it.

D. Armstead Fairweather for the husband. The object of section 2 of the Matrimonial Causes Act, 1950, and the terms of rule 2 of the Matrimonial Causes Rules, 1957, show that the

[6] [1953] P. 174, 178.

1959

WINSTONE v. WINSTONE.

intention was to keep open the door for reconciliation between the parties. It would therefore be surprising if a party could apply to the court for an injunction in respect of rights claimed in a petition before that party has obtained leave to file a petition. The requirements of section 2 that a party may not obtain leave unless he or she can show "exceptional hardship," or that the other party is "exceptionally depraved," raise issues wholly different from those which arise on an ordinary petition for divorce or for judicial separation.

Injunctions are granted by the High Court as ancillary relief to the right claimed; but that is not what is asked for here. The basis on which the injunction was granted in *Silverstone* v. *Silverstone* [7] was the court's power to secure that litigants had undisturbed access to the court. That decision was almost revolutionary, since it affected a proprietary right and excluded the husband from his own premises, whereas the Rules make it plain that in matters of property one spouse has no greater right in the matrimonial home than the other. But in *Silverstone's* case [7] matrimonial proceedings were pending, and that is not the position here.

Rule 2 is curious in its requirements as to procedure; no appearance nor evidence in rebuttal is required of the other party. Its terms may be contrasted with those of rule 58, which makes extensive provision for all ancillary matters; and the contrast in procedure supports the submission that the court has no jurisdiction to grant an injunction where the only proceedings are those on the originating summons for leave.

[WINN J. A petition is a lis and this originating summons an inquiry as to whether the marriage should be tested in the courts.]

It is analogous to the situation in which a vexatious litigant has his right to come before the court fettered by the requirement that he must obtain leave. Ancillary relief could not be granted to such a litigant.

This wife has elected to proceed under section 2 and must accept the disabilities attaching to it. She could equally well have presented a petition for judicial separation and waited for three years. Objection is also taken to the request that the adjourned summons be expedited by being heard in the Vacation Court. This wife is asking for something unknown to the Divorce

[7] [1953] P. 174.

Division. She cannot have any relief ancillary to a divorce petition until she has the leave of the court to prosecute a petition for divorce.

Hunter in reply. *Silverstone's* case,[7] far from being revolutionary, was founded on a long line of authority dealing with deserted wives in the matrimonial home. If the originating summons here is not a lis but only an inquiry, it is still a "case" within "in all cases" in section 45 (1) of the Act of 1925, or a "cause or matter" within subsection (3) conferring jurisdiction on the court to grant the relief sought.

WINN J. In this application for an injunction by the wife a serious question arises as to whether or not, sitting as I am in the Vacation Court acting for the Divorce Division, I have jurisdiction to entertain the application for an injunction which is made by the wife. The proceedings before me today arise within proceedings which are pending in the Divorce Court. The proceedings which are pending in that court, and which now stand adjourned by Stevenson J. on July 28 of this year, are proceedings initiated by an originating summons seeking the leave of the court to present a petition for dissolution of the marriage within three years after the date of the celebration of the marriage. The wife, who is desirous of presenting the petition, is Mrs. Myrtle Winstone, the husband being Eric Henry Winstone; the wife, as she was required to do by section 2 of the Matrimonial Causes Act, 1950, has sought the leave of the court to present that proposed petition.

[His Lordship read section 2 (1), and continued:] The Matrimonial Causes Rules, 1957, rule 2, provides similarly how an application shall be made to present a petition within three years of the date of the marriage, and certain procedure must be followed as prescribed by the rule. That section and those rules clearly show that at that stage of the matter Parliament and the Rules Committee both intended that the court should lean in favour of any possibility of reconciliation between persons who have been married to one another for less than three years.

The wife, being unable to present a petition for divorce, though she is able to present a petition for judicial separation, and waiting as she must, at the moment, for an appointment either before Stevenson J. or, it is suggested, before me, for the determination of the question whether she should have leave to present her

[7] [1953] P. 174.

1959

WINSTONE v. WINSTONE.

Winn J.

petition within three years, still seeks the assistance of the court. She would contend, if the matter were gone into, that protection is needed by her against the conduct of her husband by way of an injunction in the pending proceedings initiated by the originating summons.

The question which troubles me, and the question which I invited counsel to help me on, is whether the court has, before the filing of a petition for divorce, become so seised of the control of the matrimonial relations of these two parties that the court has jurisdiction to grant such relief as is asked for today. It is said by counsel on behalf of the wife that, according to Rayden, the accepted textbook authority in these matters (7th ed., p. 435): " When a matrimonial suit is pending . . . the court " will restrain one spouse from forcing his or her society upon " the other, or from other acts of molestation "; but it is plain under the Rules of 1957 that a matrimonial cause is commenced by the filing of a petition which is before the court. That means that a matrimonial suit cannot be considered to have been commenced until a petition is filed under the rules. By analogy, it is plain that no action is pending in the Queen's Bench Division until a writ is at least issued; therefore, in the special circumstances where an individual is required by some statutory provision to obtain leave before he issues a writ, that individual cannot commence, and cannot be regarded as having commenced, an action until he has, with the leave of the court, issued a writ.

I have been referred by Mr. Hunter, for the wife, to section 45 of the Supreme Court of Judicature (Consolidation) Act, 1925, which provides that " the High Court may grant . . . an injunc- " tion . . . in all cases in which it appears to the court . . . " convenient so to do "; and I have also been referred to the words of Buckley L.J. with reference to a predecessor statute, in *Morgan* v. *Hart*.[1] In my view, those words are to be construed and understood as limited to the granting of an injunction ancillary to and comprised within the scope of the substantive relief sought in the proceedings in which the application for the injunction is made. I find myself unable to accede to the cogent and helpful submissions of Mr. Hunter that once any proceedings have been competently and effectively commenced, as these proceedings for leave to file a petition within three years have been commenced, an injunction may be granted for relief on a subject-matter falling outside the ambit, scope and effect of the

[1] [1914] 2 K.B. 183, 186.

proceedings in which the injunction is sought. Here the pending proceedings have as their only object the obtaining of the leave of the court to file a petition within three years. Once that leave is obtained, then, of course, the whole matrimonial relations of the parties will be the subject-matter of any petition which is filed.

I regretfully find myself unable to accede to the submission that the Divorce Court has jurisdiction arising from the pendency of the originating summons enabling it to make orders affecting the general matrimonial relations of the parties. I regret that I feel myself compelled to take that view on this preliminary issue, because if it had been within my power to do so, I would have desired to follow and apply in the present case what Pearce J. declared in *Silverstone* v. *Silverstone* [2]; but I do not feel that it is within my power to do so. That judgment sets out the reasons why the Divorce Court should exercise any jurisdiction it has to prevent one party to a marriage from adversely influencing the approach of the other party to the court, or unreasonably interfering in the living conditions of the other party, pending the determination of the matrimonial dispute between them. I find myself regretfully compelled to take the view that that jurisdiction lies outside the jurisdiction relating to obtaining the leave of the court to file a petition within three years. I think that just as Parliament enacted that, without obtaining the leave of the court, a wife not yet married for three years could not commence proceedings for dissolution of the marriage, so it is part of the intention of Parliament that the Divorce Court should not, before such leave had been obtained, entertain applications of this kind in less time than that indicated, save in the case of a petition for judicial separation which is not affected by that parliamentary prohibition, and, it may be, in proceedings under section 23 of the Married Women (Maintenance) Act, 1949, where periodical payments are sought.

My conclusion on this preliminary issue is that while it may well be regrettable, and it may well be that the contrary conclusion might have been the better one in the interests of the parties, I cannot accept jurisdiction to entertain this application for an injunction.

Mr. Hunter has suggested that the originating summons should be treated as adjourned to me, and that I should proceed to consider first that summons and then the application for an

[2] [1953] P. 174, 176, 178; [1953] 2 W.L.R. 513; [1953] 1 All E.R. 556.

1959

WINSTONE v. WINSTONE.

Winn J.

injunction. I am unable to accede to that, for a double reason. I do not think that jurisdiction to grant this injunction arises or can be competently invoked until a petition for dissolution or, of course, a petition for judicial separation has been filed. The second reason is that I feel it would be an unwarrantable interference with the control of this matter by Stevenson J., and that it would be most irregular for me to consider the summons today when the relevant evidentiary material may not all be assembled.

Application dismissed.

Solicitors: *Kenneth Brown, Baker, Baker; A. E. Hamlin, Brown, Veale & Twyford.*

M. M. H.

NOTE: On September 18, the wife filed a petition for judicial separation, and on September 24 Winn J., in the Vacation Court, having then jurisdiction to do so, heard the motion for an injunction and made an order in terms thereon. [The Times, Sept. 25, 1959.]

C. A.

1959
June 11, 15, 16.

Hodson, Sellers and Harman L.JJ.

FISHER *v.* FISHER.

[F. 1957. (D) No. 409.]

Estoppel—Per rem judicatam—Husband and wife—Divorce—Petition by husband alleging desertion—Previous nullity proceedings by husband—Dismissal of wife's charges of cruelty in previous proceedings—Wife's answer to husband's petition alleges constructive desertion—Whether wife estopped from repeating cruelty allegations.

In September, 1954, a husband petitioned for a decree of nullity on the ground that the marriage had not been consummated. The wife by her answer denied the husband's allegation and cross-prayed for dissolution of the marriage on the ground of her husband's cruelty. The commissioner found that the marriage had been consummated, that the allegations made by the wife about the husband's conduct were proved, but that they did not amount to cruelty, and therefore both the husband's petition and wife's cross-prayer were dismissed. The wife left the matrimonial home in October, 1954, and had never returned.

In November, 1957, the husband petitioned for divorce on the ground of his wife's desertion. The wife denied the desertion and

---

[Reported by NORMAN PRIMOST, Esq., Barrister-at-Law.]

cross-petitioned for a divorce on the ground of constructive desertion. In her answer she relied on the allegations which she had raised in the previous proceedings and on some further allegations of expulsive conduct which were not raised in the previous proceedings:—

Held, that there could be no estoppel per rem judicatam where the subject-matter of litigation in previous proceedings was different, and, since constructive desertion was a fresh issue not determined in the previous proceedings, the wife was entitled to have her allegations heard and assessed in the present proceedings.

Thompson v. *Thompson* [1957] P. 19; [1957] 2 W.L.R. 138; [1957] 1 All E.R. 161 and *Winnan* v. *Winnan* [1949] P. 174; 65 T.L.R. 22; [1948] 2 All E.R. 862 applied.

Dictum of Willmer J. in *Bright* v. *Bright* [1954] P. 270, 288; [1953] 3 W.L.R. 659; [1953] 2 All E.R. 939 disapproved.

Decision of the special commissioner reversed.

APPEAL from Sir Reginald Sharpe Q.C., sitting as a special commissioner of divorce at Lewes.

The parties were married on September 5, 1936; they adopted a child in September, 1945, and the wife left the husband in 1953, but this departure was followed by a reconciliation. On September 18, 1954, the husband, Harold Francis Fisher, petitioned for nullity on the ground that the marriage had not been consummated. The wife, Winifred Mabel Fisher, by her answer denied the husband's allegation and cross-prayed for a divorce on the ground of her husband's cruelty. The wife left the matrimonial home on October 27, 1954, and never returned. On December 6, 1955, Sir Reginald Sharpe, sitting as a special commissioner, found that the marriage had been consummated, that the wife's allegations about her husband's misconduct were proved but that they did not amount to cruelty. He therefore rejected both prayers.

The present proceedings were instituted on November 8, 1957, when the husband petitioned for a divorce on the ground of his wife's desertion. The wife denied the desertion and cross-prayed for divorce on the basis of her husband's constructive desertion. In her answer she relied on allegations which were contained in her cross-prayer for cruelty in the previous proceedings and also on allegations of expulsive conduct which were not raised in the previous proceedings.

At the hearing of the suit the commissioner held that the wife was estopped per rem judicatam from putting forward her own case of desertion, since her cross-charge involved the same questions as those which had been determined against her in

C. A. 1959

FISHER v. FISHER.

previous proceedings, and further that she sought to raise some additional matters which might have been, but were not, raised in the earlier proceedings. The commissioner granted the husband a decree nisi and dismissed the wife's cross-petition. The wife appealed.

Francis B. Purchas for the wife. The relevant principle concerning estoppel per rem judicatam is stated in *Reg.* v. *Hutchings*,[1] *per* Lord Selborne L.C. The estoppel is conclusive only upon direct issues directly raised in previous proceedings. The admission of a fact which is fundamental to the decision arrived at cannot be withdrawn, and fresh litigation cannot be started with a view to obtaining another judgment based upon a different assumption of fact. The principle of setting to rest the rights of litigants applies only to the case where a point fundamental to the decision, taken or assumed by the plaintiff, and traversable by the defendant, has not been traversed: see *per* Lord Shaw in *Hoystead* v. *Commissioners of Taxation*.[2] Parties are debarred from raising in subsequent litigation only such matters as were fundamental to the decision in the previous litigation: see *per* Lord Wright in *New Brunswick Railway Co.* v. *British and French Trust Corporation Ltd.*[3]

Cruelty cannot be litigated twice as a fundamental basis of a petition, but an incident relied on in a petition based on cruelty is admissible in subsequent proceedings based on constructive desertion if it is part of the expulsive conduct relied on by the petitioner as the basis of the petition. Estoppel is a rule of evidence; it must not be confused with the evidence itself. Estoppel does not arise if the incident and issues in the subsequent proceedings differ from those in the previous proceedings. In the present case there is no estoppel because the issues are different; desertion for less than three years would be an irrelevant averment in a nullity petition. The quaestio in proceedings based on constructive desertion is not the same as that in proceedings based on cruelty. Estoppel per rem judicatam only operates where the quaestio is the same in both proceedings: see *Society of Medical Officers of Health* v. *Hope*.[4]

In so far as it conflicts with the principle of estoppel as established by these cases, *Bright* v. *Bright*[5] cannot be supported.

[1] (1881) 6 Q.B.D. 300, 304.
[2] [1926] A.C. 155, 170; 42 T.L.R. 207.
[3] [1939] A.C. 1, 36; 55 T.L.R. 260; [1938] 4 All E.R. 747.
[4] [1959] 1 Q.B. 462; [1959] 2 W.L.R. 377; [1959] 1 All E.R. 509.
[5] [1954] P. 270; [1953] 3 W.L.R. 659; [1953] 2 All E.R. 939.

The only other case that may cause difficulty is *Hill* v. *Hill*,[6] which is distinguishable from the present case on two grounds: first, because Pilcher J. there held that there was no substance in any of the allegations put forward in the first proceedings, and, secondly, because in any event the issues in both proceedings in that case were precisely the same.

In the present case reliance is placed on four types of allegations to none of which estoppel per rem judicatam is in any way applicable. First, there were the allegations made in the earlier proceedings which were relevant to both cruelty and constructive desertion; secondly, allegations of violence which might have been made but were not in fact made in the earlier proceedings; thirdly, allegations concerning the husband's associations with other women, which were included as particulars of cruelty in the earlier proceedings but are more relevant to the issue of constructive desertion than to the issue of cruelty; and, fourthly, new allegations relating to expulsive conduct which could not have been made in the previous proceedings because the statutory period of three years had not then elapsed.

As regards the second and fourth group of allegations, there never has been an adjudication upon them, because they were not raised in the previous proceedings. As to the first and third group of allegations, there never has been an adjudication upon them on the issue of constructive desertion; what was decided was that they did not constitute cruelty, but it does not follow that they cannot amount to constructive desertion. The finding that those two groups of allegations do not amount to cruelty in no way precludes a decision that they constitute constructive desertion. In any event, the wife cannot be put in peril in the present proceedings because of irrelevant matters raised in the earlier proceedings.

Nigel H. Curtis-Raleigh for the husband. There are two conflicting lines of authority on the problem of res judicata in matrimonial cases. There are the cases in the Divisional Court, *Foster* v. *Foster*[7] and *Cooper* v. *Cooper* (*No. 2*),[8] which took a narrow view of the application of the doctrine. On the other side, there are decisions of judges of first instance in the Divorce Division, *Bright* v. *Bright*[9] and *Hill* v. *Hill*,[10] which took a wider view of the doctrine. It is difficult to reconcile these two lines

[6] [1954] P. 291; [1954] 2 W.L.R. 473; [1954] 1 All E.R. 491.
[7] [1954] P. 67; [1953] 3 W.L.R. 623; [1953] 2 All E.R. 518.
[8] [1955] P. 168; [1954] 3 W.L.R. 923; [1954] 3 All E.R. 358.
[9] [1954] P. 270.
[10] Ibid. 291.

C. A.
1959
FISHER v. FISHER.

of conflicting cases. *Bright* v. *Bright* [11] covers the present case, and, if it is right, the present appeal must fail. In so far as there is a conflict between the cases, *Bright* v. *Bright* [11] ought to prevail, having been approved in *Thompson* v. *Thompson*.[12]

[HODSON L.J. I did not have this point in mind when I referred to *Bright* [13] in *Thompson*.[14]]

The wife's complaints were held in the first suit to be too trivial to be cruelty. That was the subject of the decision. The "res" is not that the commissioner made findings of fact in the wife's favour, but what he ultimately decided on the basis of those findings of fact—namely, that her complaint of cruelty failed. She is now seeking to reagitate substantially the same matters as fell to be determined in the first suit.

If the court has investigated matters in the nature of cruelty, such as violence, they cannot be raised again. On this point *Bright* v. *Bright* [15] went further, because it decided that a matter which could have been investigated in the earlier proceedings cannot be raised again. *Bright's* case [15] was specifically referred to in *Thompson's* case,[16] and, had it been thought that *Bright's* case [17] was wrong, the Court of Appeal would have said so.

The practical difficulties of holding that there was no estoppel per rem judicatam here would be immense. Suppose in a petition for cruelty the wife alleged that the husband threw a vase at her, and relied on it as an act of cruelty. Assume that the wife's petition failed, and that at a later period the husband petitioned on the ground of his wife's desertion. The wife in her answer merely has to add one allegation to those in her former petition—namely, that when the husband threw the vase at her he told her to go from the matrimonial home, so as to be guilty of expulsive conduct—and the wife could cross-pray for constructive desertion and have the whole matter reinvestigated again. That is just the type of situation which must be avoided.

The wife here, having failed on cruelty, is now trying to revive it in the guise of constructive desertion; she is building up a case of constructive desertion by a case of unproved cruelty. The courts will not permit this: see *Pike* v. *Pike* [18] and *Timmins* v. *Timmins*.[19] If the wife's complaints in the first suit did not amount to cruelty, they were not grave and weighty matters.

[11] [1954] P. 270.
[12] [1957] P. 19; [1957] 2 W.L.R. 138; [1957] 1 All E.R. 161.
[13] [1954] P. 270.
[14] [1957] P. 19, 38.
[15] [1954] P. 270.
[16] [1957] P. 19, 38.
[17] [1954] P. 270.
[18] [1954] P. 81; [1953] 3 W.L.R. 634n.; [1953] 1 All E.R. 232.
[19] [1953] 1 W.L.R. 757; [1953] 2 All E.R. 187.

Thompson's case [20] is distinguishable because there the facts relating to cruelty were not canvassed; the charge in the earlier proceedings in that case was wilful neglect to maintain; cruelty was never a specific issue in the earlier proceedings. The res in both proceedings in *Bright's* case [21] was whether there was cruelty or not. The facts in support of the res are irrelevant.

[HARMAN L.J. It has never been said that cruelty and constructive desertion are the same issue.]

There may be a theoretical distinction between cruelty and constructive desertion, but exactitude has to be sacrificed for practicability. Wherever cruelty fails, it is only necessary to add an allegation of expulsive conduct to make the matter one of constructive desertion, and the practical result is a retrial. To avoid that situation they should be treated as raising the same issue. The general practice is to regard an unsuccessful cruelty petition as an end of the matter.

[SELLERS L.J. Cruelty and constructive desertion are not the same.]

The practical result must be borne in mind. There must be an end to litigation. If *Bright* v. *Bright* [21] were overruled, the result would be that there might be no end to litigation in any cruelty case. Here the wife is seeking to rely on allegations she could have raised in the earlier proceedings. *Hoystead* v. *Commissioners of Taxation* [22] shows that the courts do not permit that.

[SELLERS L.J. But in *Hoystead's* case [22] the issues were the same. In the present case the issues are not the same.]

The courts ought to ignore artificial distinctions. What the wife complained of was her husband's conduct. Where there are new facts and new matters the court has to investigate them. In *Foster* v. *Foster* [23] there was fresh cruelty after the first proceedings in that case. In the present case nothing new has happened; there has been no fresh cruelty or expulsive conduct.

It would be most oppressive if the husband's conduct could be the subject of further litigation. Whether it is treated as cruelty or as constructive desertion, any difference between these two grounds for divorce in this type of case would be minute. They really comprise the same issue—and that issue has been decided. [Reference was also made to *Broken Hill Proprietary Co.* v. *Broken Hill Municipal Council.*[24]]

[20] [1957] P. 19.
[21] [1954] P. 270.
[22] [1926] A.C. 155.
[23] [1954] P. 67.
[24] [1926] A.C. 94.

C. A.
1959
FISHER
v.
FISHER.

Purchas in reply. Another case which shows the nature of estoppel is *Put* v. *Rawsterne*.[25] The subject-matter of both proceedings in that case was the same, but the first action was in trespass and the second in trover, and, therefore, since different issues arose in both actions, even though the subject-matter was the same, there was no estoppel. In the present case also the issues are not the same. The doctrine has always been that the precise issue adjudicated upon in earlier proceedings cannot be raised again, but in the present case there never has been an adjudication upon the issue of constructive desertion. Speaking of the doctrine of estoppel, Morris L.J. in *Society of Medical Officers of Health* v. *Hope*[26] said: "It has, however, always "been clear that the plea will only avail if it appears that there "is an attempt to reopen the very matter that has been decided."

If the wife's contentions are not accepted she will be put in an impossible position as respects allegations of expulsive conduct. At the time of the earlier proceedings she could not have cross-prayed for constructive desertion because three years' desertion had not then run. If any allegation of expulsive conduct had been pleaded, it might have been struck out as irrelevant to cruelty; if it is not pleaded, she might be estopped. It cannot be right to compel her to elect between those two courses. She must be entitled to have her case tried on matters that were not determined before.

HODSON L.J. stated the facts and continued: That the wife left her husband, and had never since returned, was common ground between the parties; but as to the circumstances leading up to her leaving, she was not permitted by the commissioner to give any evidence at all. The issue of desertion was not open to the wife in the earlier proceedings, which were for nullity, and it was no defence to that petition that the wife had been deserted. Moreover, she could not then make a substantive allegation of desertion as the foundation for a petition for divorce because the period which had elapsed since the separation was less than three years.

In those circumstances, it would indeed be strange if the wife were estopped from setting before the court and having decided the question of whether or not she had been deserted by her husband. But the commissioner, in holding that she was estopped, followed the decision of Willmer J. in *Bright* v.

[25] (1682) T.Raym. 472.

[26] [1959] 1 Q.B. 462, 480.

Bright.[1] The judge in that case based himself on the Privy Council decision of *Hoystead* v. *Commissioners of Taxation*,[2] and I think it is desirable to refer to that case first. The dispute there was about an income tax assessment. The headnote reads: "Under a will the annual income from an estate in Australia was "divisible by the trustees between the testator's daughters. The "trustees objected to an assessment for the financial year 1918–"1919 under the Land Tax Assessment Act, 1910–1916 of "Australia . . .", and they claimed a deduction in respect of the share of each daughter.

"A case was stated for the opinion of the full court of the "High Court upon the questions (1) Whether the shares of the "joint owners, or any of them and which of them, in the land "were original shares . . . (2) How many deductions . . . the "respondent should make. The full court answered these "questions as follows: (1) The shares of the six children sur-"viving at the date of the assessment; (2) Six. Judgment upon "the objection was entered accordingly. Upon the assessment "for 1919–1920 the commissioner allowed only one deduction "of £5,000, contending that the beneficiaries were not joint "owners within the meaning of the Act." That view was upheld by the full court; but it was held by the Privy Council: ". . . "that the commissioner was estopped, since although in the "previous litigation no express decision had been given whether "the beneficiaries were joint owners, it being assumed and "admitted that they were, the matter so admitted was "fundamental to the decision then given."

Lord Shaw, in giving the judgment of the Board, said[3]: "It "is seen from this citation of authority that if in any court of "competent jurisdiction a decision is reached, a party is estopped "from questioning it in a new legal proceeding. But the prin-"ciple also extends to any point, whether of assumption or "admission, which was in substance the ratio of and fundamental "to the decision. The rule on this subject was set forth in the "leading case of *Henderson* v. *Henderson*[4] by Vice-Chancellor "Wigram as follows: 'I believe I state the rule of the court "'correctly when I say that, where a given matter becomes the "'subject of litigation in, and of adjudication by, a court of "'competent jurisdiction, the court requires the parties to that "'litigation to bring forward their whole case, and will not

[1] [1954] P. 270; [1953] 3 W.L.R. 659; [1953] 2 All E.R. 939.
[2] [1926] A.C. 155; 42 T.L.R. 207.
[3] [1926] A.C. 155, 170.
[4] (1843) 3 Hare 100, 114, 115.

C. A.
1959
FISHER
v.
FISHER.
Hodson L.J.

" ' (except under special circumstances) permit the same parties " ' to open the same subject of litigation in respect of matter " ' which might have been brought forward as part of the subject " ' in contest, but which was not brought forward, only because " ' they have, from negligence, inadvertence, or even accident, " ' omitted part of their case. The plea of res judicata applies, " ' except in special cases, not only to points upon which the " ' court was actually required by the parties to form an opinion " ' and pronounce a judgment, but to every point which properly " ' belonged to the subject of litigation, and which the parties, " ' exercising reasonable diligence, might have brought forward " ' at the time.' "

Those are wide words, but they have been considered by the House of Lords in *New Brunswick Railway Co.* v. *British and French Trust Corporation Ltd.*,[5] where Lord Romer, referring to the passage which I have read from Lord Shaw's judgment, said: " It was sought to treat this passage as an authority for " the proposition that the plea of res judicata can successfully be " raised whenever it can be shown that a question substantially " similar to that being litigated has been decided in an earlier " action between the same parties. My Lords, I cannot read " the words that I have just cited as laying down any such " proposition, a proposition for which, I venture to think, no " authority can be found in the books. It is no doubt true to " say that whenever a question has in substance been decided, " or has in substance formed the ratio of, or been fundamental " to, the decision in an earlier action between the same parties, " each party is estopped from litigating the same question there- " after. But this is very different from saying that he may not " thereafter litigate, not the same question, but a question that " is merely substantially similar to the one that has already been " decided. If in an action the question of the construction of a " particular document has been in substance decided, each party " to the action is estopped from subsequently litigating the same " question of construction of that particular document. But he " is not estopped from subsequently litigating the question of " construction of another document even though the second one " be in substantially identical words. For the documents are " two distinct documents, and the questions of their construction " are two distinct questions."

[5] [1939] A.C. 1, 43; 55 T.L.R. 260; [1938] 4 All E.R. 747.

Willmer J., in the *Bright* case,[6] sought to apply those principles which he derived from the judgment in *Hoystead*[7] in a case where there had been previous proceedings by a wife alleging cruelty, inter alia, and subsequent proceedings by a wife alleging desertion, and based on the same matters in part as she had raised in the earlier proceedings. He came to the conclusion that as to those matters which had been previously raised, they had specifically been decided against her in the earlier proceedings, and therefore she could not raise them again. But he went on to say that she was estopped from raising certain matters not specifically raised before on the ground that those allegations could well have been brought forward as part of the previous case of cruelty if they were allegations of substance.

It is only the second part of his decision which is, I think, open to criticism, because it is, after all, a salutary and necessary principle that one party should not be permitted to vex and oppress his opponent by repeating allegations which have been previously made and decided adversely to that party. But the rule has to be confined within proper limits, and sometimes it has been difficult to determine how the rule should be applied in particular cases. The most recent statement of the rule, I think, was that of Morris L.J. sitting in this court as one of the majority in *Society of Medical Officers of Health* v. *Hope*.[8] He said[9]: "The underlying principle supporting a plea of res "judicata is that it is desirable that litigation should end, and "that it is undesirable that a person should be vexatiously "pursued in litigation in regard to a matter that has already "been decided. It has, however, always been clear that the "plea will only avail if it appears that there is an attempt to "reopen the very matter that has been decided." The question often arises, what is "the very matter that has been decided"?

Before passing from *Bright* v. *Bright*[10] I should refer to the recent decision of this court in *Thompson* v. *Thompson*,[11] in which *Bright's* case[12] was discussed. The actual question which arose for decision in *Bright* v. *Bright*—certainly the second question which has been criticised—did not arise in *Thompson* v. *Thompson*. I ought to refer to some observations of my own about *Bright* v. *Bright* because I think that what I said[13] then

[6] [1954] P. 270.
[7] [1926] A.C. 155.
[8] [1959] 1 Q.B. 462; [1959] 2 W.L.R. 377; [1959] 1 All E.R. 509.
[9] [1959] 1 Q.B. 462, 480.
[10] [1954] P. 270.
[11] [1957] P. 19; [1957] 2 W.L.R. 138; [1957] 1 All E.R. 161.
[12] [1954] P. 270.
[13] [1957] P. 19, 38.

C. A.
1959
FISHER
v.
FISHER.
Hodson L.J.

is certainly incomplete, and may well be misleading. I referred to *Bright* v. *Bright* [14] and *Hill* v. *Hill* [15]—another decision arising in the divorce jurisdiction—as "cases where there had been "previous divorce proceedings in which judgment had been given "against parties who were held to be estopped from again raising "in later divorce proceedings issues which had been decided in "the earlier divorce proceedings. In such cases there is no "difficulty in applying the ordinary principles of estoppel." I did not make it clear in that passage that I was considering only those issues which the wife in *Bright* v. *Bright* [16] had sought to raise again after those specific issues had been determined against her in earlier proceedings. But I did refer again to *Bright* v. *Bright*, showing that I had in mind the criticism which can be and, I think, must be said to be validly directed against the second part of Willmer J.'s decision. I said [17]: "In dealing "with the decision of Willmer J. in *Bright* v. *Bright* I have not "overlooked the observations of the Divisional Court in *Cooper* "v. *Cooper* (*No. 2*),[18] which, however, do not touch the particular "aspect of estoppel raised in this appeal." I may say that the majority decision in *Thompson* v. *Thompson* [19] was to the effect that there was no estoppel, because the charges of cruelty which the wife sought to make in the *Thompson* case had not previously been in issue at all. There had been earlier proceedings for wilful neglect to maintain in which she had made accusations that her husband was cruel, but the allegation of cruelty was not specifically made. It is, I think, always difficult in these cases to distinguish between them when one has to bear in mind that the facts of the cases nearly always differ, and very often there is more than one ratio decidendi in the particular case.

I must now make a reference to the decision of the Divisional Court which was referred to—*Cooper* v. *Cooper* (*No. 2*) [20]—which followed *Foster* v. *Foster*,[21] another decision of the Divisional Court. In the *Bright* case [22] Willmer J. had sought to distinguish *Foster* v. *Foster*,[23] but Lord Merriman P. in *Cooper* v. *Cooper* [24] disapproved of that part of the judgment of Willmer J. in the *Bright* case which related to matters which might have been raised as particulars of cruelty in so far as the judge held that

[14] [1954] P. 270.
[15] [1954] P. 291; [1954] 2 W.L.R. 473; [1954] 1 All E.R. 491.
[16] [1954] P. 270.
[17] [1957] P. 19, 39.
[18] [1955] P. 168; [1954] 3 W.L.R. 923; [1954] 3 All E.R. 358.
[19] [1957] P. 19.
[20] [1955] P. 168.
[21] [1954] P. 67; [1953] 3 W.L.R. 623; [1953] 2 All E.R. 518.
[22] [1954] P. 270.
[23] [1954] P. 67.
[24] [1955] P. 168.

the wife was estopped from raising them in desertion proceedings by directing her evidence to expulsive matter. The President said [25]: " It is said that this decision of ours in *Foster* v. *Foster* [26] " has been distinguished and criticised by Willmer J. in *Bright* " v. *Bright*.[27] I venture to observe that in so far as there is a " difference between the two cases, and the principles on which " they are decided, this court is bound, as indeed was Willmer J., " by the decision in *Foster* v. *Foster* [28] if it is applicable. I do " not propose to go through all the detail of the various matters " which were used in connection with the two charges of cruelty " in *Bright* v. *Bright* [29] which had been dismissed by the com- " missioner, and the particulars which were given in support of " the charge of desertion, save one only. It appears that one " of the new allegations which had not been included in the " dismissed petition for cruelty was an allegation in paragraph 13 " that ' between the years 1927 and 1930 at The White House, " ' Freetown, the respondent frequently told the petitioner that " ' he no longer wanted her, and wished that she could go.' If " that allegation had been dealt with on the ground that it could " not fairly be taken to be expulsive conduct, that would be one " thing; but ruling it out as inadmissible, in spite of the fact that " it had not been put before the court on the charge of cruelty, " though it ought to have been put before the court on that " charge, is another thing. I now refer to one passage in Will- " mer J.'s judgment: ' In the result, I hold that so far as this " ' petition raises the same allegations as those put forward in " ' the previous petition for cruelty the wife is estopped from " ' reiterating those allegations in support of her plea of construc- " ' tive desertion.' " In the previous decision those allegations had been specifically rejected.

The President continued [30]: " So far, I have no comment or " criticism to make; but it then goes on: ' That decision covers " ' paragraphs 14, 15 and 17, which, as I pointed out, are para- " ' graphs reiterating matters which formed the subject of specific " ' allegations and specific findings in the previous case.' Very " good." Then he quotes again with regard to three other paragraphs of which No. 13 raises matters not specifically raised in the previous proceedings, quoting Willmer J: " . . . ' It is clear " ' to me that these allegations could all well have been made as " ' part of the cruelty case which it was then sought to establish;

[25] [1955] P. 168, 174.
[26] [1954] P. 67.
[27] [1954] P. 270.
[28] [1954] P. 67.
[29] [1954] P. 270.
[30] [1955] P. 168, 175.

C. A.
1959
FISHER v. FISHER.
Hodson L.J.

"'indeed, one could go further, and say from experience of this "'court that each of them is of the type commonly raised in "'almost every cruelty case which comes before this court.' "And then Willmer J. says that that brings it within the passage "in Lord Shaw's opinion in *Hoystead* v. *Commissioner of Taxation*[31] which had already been cited in full in support of the "proposition that estoppel relates not only to acts which actually "were raised and decided, but to anything which ought to have "been raised and was not raised, deliberately or otherwise, on "the occasion before. So far as that lays down that because, "in the course of a charge of cruelty, matters may emerge or "even be particularised suggesting that the husband wishes the "wife to clear out, or even puts it plainer than that and tells "her to clear out, the dismissal of the cruelty charge operates "as an estoppel from using that class of evidence in support "of a charge of constructive desertion, I respectfully disagree, "and if that is the purport of that paragraph, as I think it is, "I think that it conflicts essentially, though the details of the "cases are different, with the decision of this court in the case "of *Foster* v. *Foster*,[32] and I am not prepared to accept it."

Karminski J.[33] agreed with the opinion expressed by the President and, in my view, that expression of opinion by the Divisional Court has the effect, which I think is right, that part at any rate of Willmer J.'s decision in *Bright* v. *Bright*[34] cannot be supported.

It is to be observed that the allegations made in the present case are not the same as those which were made in the *Bright* case in this respect, because the allegations (which have been repeated in this petition from the earlier pleading) are allegations of matters which had not been determined adversely to the wife in the previous proceedings. The commissioner who tried the earlier case—who was the same commissioner who tried the later case—preferred the wife's evidence to that of the husband; but in arriving at a conclusion that there was no cruelty, he based himself in part on the fact that there was no evidence of injury to the wife's health. He concluded that even in the light of his finding as to the correctness of the wife's evidence about the matters she relied on for cruelty, he did not think it would be at all possible to hold the husband's behaviour as amounting to cruelty.

[31] [1926] A.C. 155.
[32] [1954] P. 67.
[33] [1955] P. 168, 176.
[34] [1954] P. 270.

There is no question of the wife's allegations having been rejected, and therefore there is no question of her seeking to re-agitate in later proceedings matters of fact which have been specifically determined against her in earlier proceedings.

As to the second group of allegations, they are, I think, of the same character as those which were excluded by Willmer J. in the *Bright* case, that is to say, allegations of what is called expulsive conduct. It is quite true, as Willmer J. indicated, that in cruelty cases very often everything conceivable is included which may possibly have a bearing upon the issue of cruelty, the pleading usually being based upon a course of conduct coupled with an allegation of injury to health; and it is very often difficult to say that any matter which takes place between husband and wife which savours of unkindness is irrelevant. But that is not to say that details of expulsive conduct, if excluded from a previous suit based on cruelty, cannot be relied on in a subsequent case based upon desertion.

In the present case, I think that it is the duty of the court quite clearly on the facts, as I have stated them, to give the wife an opportunity of having heard her case on desertion, and her case in so far as it consists of a denial of her husband's allegations of desertion. She has so far been deprived of that opportunity by what I regard as a misapplication of the rule applicable to res judicata. To enable her to pursue her remedy is not, I think, in breach of that part of the rule which is relevant here stated in Spencer Bower on Res Judicata, p. 9, that, to establish res judicata it must be proved: "(v) That the "judicial decision was, or involved, a determination of the same "question as that sought to be controverted in the litigation in "which the estoppel is raised."

I agree that the language of the *Hoystead* case [35] can be read as lending support to the argument accepted first by Willmer J., and afterwards by the commissioner. But I think that on consideration that language does not support the whole of the judge's judgment, and that this appeal should be allowed. The case should, in my opinion, be sent back for re-trial; and I think it would be right in the circumstances of this case that the matter should go for re-trial before the same commissioner, if he is available to take it.

SELLERS L.J. I feel no doubt that this matter must be tried, and that the case must go back for the wife's allegations to be

[35] [1926] A.C. 155.

BIBL. LONDIN UNIV.

C. A.
1959
FISHER
v.
FISHER.
Sellers L.J.

heard and assessed. No decision has been reached at any time on the issue of constructive desertion by the husband of his wife. Some evidence of the wife in the previous proceedings, which was in fact accepted, was held not to be cruelty, and that decision seems to have been arrived at, as my Lord has said, because the commissioner—who was the same judge who tried this case from which appeal now lies—was not able to find that the acts which were proved were sufficient in themselves to amount to cruelty or had, in any event, affected the wife's health. But that evidence was, as evidence, accepted in her favour as acts which had taken place between the parties. It seems to be available to the wife, and there is nothing to estop her from relying on it along with the additional matters which she wishes to raise to support her allegation that, on a proper consideration of the whole of the facts, there should be a finding of constructive desertion by the husband.

We were invited by the commissioner—at least observations in the course of the argument invited this court—to review the whole of the cases. I do not feel free to examine either the several authorities which have been cited to us, or the principles which they establish. If it were otherwise, I think there is some conflict of judicial opinion which might well be considered. But I feel that this court is precluded from any such investigation because, as I follow it, this matter, so far as the present case is concerned, has been decided by the case to which my Lord referred, and the previous decision on which it was based. The decision in *Thompson* v. *Thompson* [36] by a majority was in these terms, which are, I think, an accurate summary of the decision of the majority, Hodson and Morris L.JJ.: "The allegation "of cruelty put forward by the wife in the divorce proceedings "should not be struck out on the ground that she had previously "failed to establish the same charge in the maintenance pro- "ceedings, for the subject of litigation was not the same in the "two sets of proceedings."

The decision of this court in the *Thompson* case followed the decision of the Court of Appeal in *Winnan* v. *Winnan* [37]—in which Bucknill L.J. delivered the first judgment and with whom Lord Morton of Henryton and Asquith L.J. agreed—and the same principles are set out there. The second ground on which the *Winnan* case was decided was that "the subject of litigation in "the two proceedings was not the same." The litigation in the

[36] [1957] P. 19.

[37] [1949] P. 174; 65 T.L.R. 22; [1948] 2 All E.R. 862.

two proceedings here is not the same, and those two cases would appear to be binding authorities on this court.

But whatever the right view is on that matter, this is a case in which there can be no estoppel because, in my view, quite plainly the issue has never been tried in any way whatsoever. The facts should be given consideration, not as to whether they amount to cruelty, but looked at again to see whether they amount to something other than cruelty and establish constructive desertion, because it was conceded by counsel there is a difference between the two. It is not necessary in order to establish constructive desertion that the facts relied on should of necessity amount to cruelty.

I therefore feel that this appeal should be allowed, and the matter should be tried by the same commissioner. I think that is most desirable.

HARMAN L.J. I agree. It seems to me that the result of the present case comes largely from a confusion of terms. That is a very potent source of deception and it arises here again. It can be truly said that this wife has made unfounded charges of cruelty against her husband; that may mean either that the court rejected the facts alleged or that though it accepted them, it decided they did not amount to cruelty as that word is understood in the Divorce Court.

The second is the present case. It follows that these charges of cruelty may not be repeated as such. That is a very different matter from saying that those same facts did not amount to matters relevant to an issue of constructive desertion which, as my Lord has said, has never been tried at all.

It would indeed be an astonishing result of the confusion in which words can result if the wife, on an issue which has never been before the court, were compelled to be silent about matters which the court has already declared she has truly stated. That she should be kept silent even from true words on a new issue is an astonishing plea. With all respect to the very energetic argument we have heard, I think this court would be landed in an absurdity if we prevented this wife from telling the truth about her case.

I agree, therefore, that the appeal should be allowed, and with the course proposed by my Lords.

Appeal allowed with costs in Court of Appeal and below.

Solicitors: *Marsh & Ferriman; Cyril E. Wheeler.*

1959
July 20,
21, 31.

Phillimore J.

WHYSALL *v.* WHYSALL.

Husband and Wife—Divorce—Insanity—"Incurably of unsound mind"—Test of—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 1 (1) (*d*).

A husband, who was a coal miner, was certified insane and entered a mental hospital in 1952 where he had remained. In February, 1958, the wife filed a petition for dissolution of marriage under section 1 (1) (*d*) of the Matrimonial Causes Act, 1950,[1] on the ground that the husband was incurably of unsound mind and also on the ground of cruelty. The husband, by the Official Solicitor as his guardian ad litem, filed an answer in October, 1958, denying both charges. The question whether the husband was incurably of unsound mind was ordered to be tried as a preliminary issue.

According to the medical evidence given at the hearing of the issue the husband was of unsound mind and the prognosis was that although he might shortly be released from hospital, there was no hope of more than a partial recovery enabling him to live a life as the subject of sympathetic supervision and care. In order to maintain even that degree of recovery he would have to take regular, prophylactic, self-administered doses of drugs:—

Held, that on the true interpretation of section 1 (1) (*d*) of the Act of 1950, the intention of Parliament embodied in the words "incurably of unsound mind" was to enable one spouse to obtain a dissolution of the marriage when the mental incapacity of the other was, despite five years' care and treatment, such as to make it impossible for the parties to live a normal married life together, and when there was no prospect of their being able to do so in the future.

That no distinction was to be drawn between the phrase "unsound mind" and the word "insanity," and that the test of the state of mind required was to be found in section 90 (1) of the Lunacy Act, 1890,[2] namely, "incapable of managing himself and his affairs," provided that the word "affairs" was taken to include the problems of society and of married life, and that the test of the ability to manage affairs was that to be required of a reasonable man.

[1] Matrimonial Causes Act, 1950, s. 1 (1): "... a petition for divorce may be presented to the court either by the husband or the wife on the ground that the respondent— ... (*d*) is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition; ..."

[2] Lunacy Act, 1890, s. 90 (1): "The Judge in Lunacy may upon application by order direct an inquisition whether a person is of unsound mind and incapable of managing himself and his affairs."

Smith v. *Smith* [1940] P. 179; 56 T.L.R. 760; [1940] 2 All E.R. 595 followed.

That, as to the test to be applied to the word "incurably," the fact that a spouse, who had been released after at least five years' care and treatment, had to take prophylactic measures did not, in itself, render that spouse "incurably of unsound mind"; the test was whether that spouse could hope to be restored to a state in which he was capable of managing himself and his affairs.

Randall v. *Randall* [1939] P. 131; 55 T.L.R. 224; [1938] 4 All E.R. 696 applied.

Accordingly, in the present case, it was clear on the medical evidence as a whole, that there was no hope that the husband could be restored to such a condition; the wife had, therefore, proved that the husband was incurably of unsound mind and was entitled to a decree nisi.

ISSUE.

The parties were married in December, 1939. On May 5, 1952, the husband, who was a coal miner, entered Pastures Hospital, Mickleover, Derbyshire, having been certified insane, and remained there in that condition. By her petition of February, 1958, the wife sought a dissolution of the marriage on the ground that the husband was incurably of unsound mind, and had been continuously under care and treatment for a period of at least five years immediately preceding the presentation of her petition and, secondly, on the ground of the husband's cruelty. After the filing of her petition the wife entered the same hospital but was at all material times able to give instructions to her solicitors and counsel. In October, 1958, the husband, by the Official Solicitor as his guardian ad litem, filed an answer denying that he was incurably of unsound mind, and also denying the charge of cruelty. The District Registrar ordered that the question whether the husband was incurably of unsound mind be tried as a preliminary issue.

According to the medical evidence given at the trial of the issue the husband was of unsound mind. The prognosis was that he might shortly be released from hospital, but that there was no hope of more than a partial recovery enabling him to live a life in which he was the subject of sympathetic supervision and care, that he would be apathetic and lacking in volition, that he would, perhaps, be able to work as a labourer but would be unfit to deal with the simple problem of how to dispose of his wages. In order to maintain even that condition he would have to take regular, prophylactic, self-administered doses of drugs.

1959

WHYSALL v. WHYSALL.

R. J. A. Temple Q.C. and *T. R. Heald* for the wife.
Roger Ormrod Q.C. and *K. R. Bagnall* for the husband.

Roger Ormrod Q.C. and *K. R. Bagnall* for the Official Solicitor as guardian ad litem of the husband. The question is whether the husband is incurably of unsound mind so as to entitle the wife to a decree of divorce. According to section 1 (1) (*d*) of the Matrimonial Causes Act, 1950, a petitioner was, in such circumstances, entitled to relief if the respondent had been continuously under care and treatment for five years preceding the presentation of the petition, that is to say, if the respondent had during the specified period been detained under an order or had been detained under an order followed by detention as a voluntary patient. Since the Divorce (Insanity and Desertion) Act, 1958, however, the meaning of care and treatment has been extended to cover the respondent's residence in a hospital where he is receiving treatment for mental illness during the requisite period. The Act of 1958 has, therefore, swept away a very important safeguard in favour of respondent spouses, namely, detention under an order and, therefore, indisputable unsoundness of mind at some stage during the course of the mental illness upon which the case of the petitioning spouse rests.

The latter provision has thus affected the question which is the subject of the present issue—whether, at the date of the hearing, the respondent is of unsound mind and whether that condition can be said to be incurable—by rendering it more difficult of answer. That difficulty has been increased by the progress in the treatment of mental patients during recent years, which has, in many cases, quite altered the prognosis by improving the prospects of recovery even in severe or chronic cases. The number of respondents against whom a decree of divorce has been granted on the ground of incurable unsoundness of mind and who have subsequently been discharged from mental hospitals is relatively high. The importance and difficulty of proving incurable unsoundness of mind has now been brought sharply into prominence, whereas, until the Act of 1958, it scarcely arose, since the requirements of section 1 (2) of the Act of 1950, if fulfilled, frequently concluded the issue, and nearly all the authorities tended to deal with the various aspects of detention required to satisfy that section or the aspect of continuity required under section 1 (1) (*d*).

Logically, one cannot begin to consider the issue of incurability without first determining the meaning of unsoundness of mind.

This is a purely legal concept which has not yet been defined in any statute or authority. It must be defined in legal terms, that is to say, in terms of the capacity of the person concerned to perform legal acts and to be subject to legal duties and responsibilities. A person who is regarded as fully responsible for his actions in law cannot be a person of unsound mind. The definition must be legal and not based on medical diagnosis, since the latter depends on symptoms and is not primarily related to the effect of such symptoms on the patient's capacity to act reasonably. [Various statutes in which the phrase " unsound mind " occurred were then referred to, namely, the Lunacy Act, 1890, ss. 90 (1), 116 (1), 335 and 341, and Forms 1 and 8, and the Mental Treatment Act, 1930, ss. 1, 5 and 20 (5).] It is clear that in enacting section 1 (1) (*d*) and 1 (2) of the Matrimonial Causes Act, 1950, Parliament did not intend the phrase " incurably of unsound " mind " to describe a person who would have to remain indefinitely subject to a reception order, since, by section 1 (2) (*d*), upgrading to a voluntary patient, provided that it immediately followed detention for a period under a reception order, did not interrupt the period of care and treatment: see *Randall* v. *Randall*.[3] That provision, however, does not justify the corollary that a person who is a voluntary patient and has been subject to a reception order over a period of five years is a person of unsound mind, for all three requirements must be satisfied, namely, unsoundness of mind, incurability and five years' care and treatment.

A contrast is to be drawn between that Act and the Divorce (Scotland) Act, 1938, by which five years' care and treatment raises a presumption of incurable insanity; further, the Act of 1958 emphasises that detention is not the test of unsoundness of mind in England.

As to the authorities, in *Swettenham* v. *Swettenham*,[4] in which the respondent was detained under an order, the precise issue now before the court was raised but not decided. A submission that unsoundness of mind must be such as to justify the breaking of the marriage tie, that is to say, to make it practically impossible for the parties to live together, was not accepted and incurability was equated to irrecoverability. In *Randall* v. *Randall*[5] the view taken by Sir Boyd Merriman P. was that it

[3] [1939] P. 131; 55 T.L.R. 224; [1938] 4 All E.R. 696.

[4] [1938] P. 218; 54 T.L.R. 903; [1938] 3 All E.R. 183.

[5] [1939] P. 131.

1959

WHYSALL v. WHYSALL.

was not right to say that the court must be satisfied that the respondent was certifiable at the date of the hearing but that it must at the very least be satisfied that care and treatment as a voluntary patient was necessary. The proposition that the court was not concerned with the question of the degree of unsoundness of mind save in so far as it was tested by the requisite period of care and treatment was, it is submitted, per incuriam. It is questionable in that case, in which the respondent was found to be incurably of unsound mind, whether the decision might not have been otherwise if discharge were to have been said to be imminent. *Smith* v. *Smith* [6] is of importance for the proposition that there is no distinction between insanity and unsoundness of mind. [Reference was made to the Trustee Act, 1850, to *In re Martin's Trusts* [7] and to the Lunacy Regulation Act (Ireland), 1871.] It is repugnant to the conception of marriage that a man may be considered fit to manage his affairs or capable of acting as a trustee and yet be divorced as a person incurably of unsound mind. It is, therefore, submitted that the test of unsound mind should be that provided by section 90 (1) of the Lunacy Act, 1890, that the respondent is incapable of managing himself and his affairs due to mental illness, and that the question to be answered by the doctors when the court has to consider incurable unsoundness of mind is: Is the respondent fit to, or, so far as medical knowledge goes, capable of becoming or being rendered fit to manage his affairs.

On the medical evidence in the present case it is possible that the respondent will be discharged from hospital and be able to lead a reasonably normal life. The fact that he will, as many other persons suffering from physical disabilities, require to take regular doses of drugs in order to maintain that degree of normality does not, in itself, and ought not to justify his being regarded as incurably of unsound mind. In those circumstances it is submitted that the wife petitioner has failed to discharge the burden of proof and her petition should be dismissed.

R. J. A. Temple Q.C. and *T. R. Heald* for the wife. According to the medical evidence the most favourable prognosis for the respondent is that of semi-social recovery, and by section 83 of the Lunacy Act, 1890, which deals with the recovery of patients, it is clearly implied that recovery means cured. Although in the

[6] [1940] P. 179; 56 T.L.R. 760: [1940] 2 All E.R. 595.

[7] (1887) 34 Ch.D. 618.

present case some of the symptoms are repressed and the husband may be able to live outside an institution, he is, therefore, incurable.

The relevant statutes do not define the words "of unsound mind," and those words are, therefore, to be given their ordinary meaning in accordance with the accepted principles governing the interpretation of statutes, that is to say, with the assistance of dictionaries and the user of the same words in other statutes. Evidence may not be called to place upon the words of a statute a special technical meaning. *Marquis Camden* v. *Inland Revenue Commissioners*[8] is authority for that proposition, and that approach was adopted in the present context by Sir Boyd Merriman P. in *Smith* v. *Smith*.[9]

It is conceded that capacity to manage oneself and one's affairs is one of the ingredients by which that general incapacity involved in the concept "of unsound mind" may be tested. But it is not the sole test, since it is a test relevant to the degree of incapacity, a matter which the court has resolutely refused to enter into since *Randall* v. *Randall*,[10] in which Sir Boyd Merriman P. rejected the laying down of any test for unsoundness of mind. The reason for that is plainly that, in matters of statutory interpretation, absence of definition amounts to absence of restriction in interpretation. The matter under consideration is thus left, as it is submitted it should be, for the court to take into account all the circumstances of the particular case. The general undesirability of definition may be illustrated by the example of a probate action in which a testator is found perfectly capable of managing his affairs yet incapable of making a valid will because he was suffering from delusions testamentary in character as to his relatives.

[PHILLIMORE J. Do you say that a patient discharged as a case of semi-social recovery remains of unsound mind however small the degree of damage done to him by his mental illness?]

Yes, the principle of de minimis may apply, but if there is some scar left by the disease of the mind it is for the medical expert to say whether the patient is cured. There is no single test for unsoundness of mind; it is purely a question for the court on the evidence before it. The test of curability is simply whether the patient is discharged recovered. If so, a petition under section 1 (1) (*d*) of the Act of 1950 fails; if not, it succeeds.

[8] [1914] 1 K.B. 641.
[9] [1940] P. 179.
[10] [1939] P. 131.

1959

WHYSALL v. WHYSALL.

In a case such as the present, where a patient has to subject himself to regular doses of drugs, he cannot be said to be cured. Just as a diabetic who takes insulin may appear to be cured but remains a diabetic, so a schizophrenic under treatment by Largactil remains a latent schizophrenic. It is submitted that a person who needs regular treatment to suppress manifestations of insanity must be said to be of unsound mind. Alternatively, such recovery as this respondent might be capable of cannot be regarded as a recovery from his mental illness. Although his schizophrenic tendencies may remain to a large extent latent, he will be unable to live a life approaching normal. Whether deciding this matter on the plain words of the statute or applying the test suggested by counsel for the Official Solicitor, it is submitted that the wife has proved her case and is entitled to a decree.

Ormrod Q.C. replied.

Cur. adv. vult.

July 31. PHILLIMORE J. referred to the facts of the marriage and the proceedings and continued: My task has been greatly facilitated by the fact that the three medical experts called are virtually in agreement. Inevitably, there is some slight difference in emphasis in their evidence, but on the broad question of the husband's state of health and prospects of recovery, or cure, they are substantially agreed.

The facts, which I regard as indisputable in the light of the evidence, are as follows: The husband, who is a coal miner, entered the Pastures Hospital on May 5, 1952, a reception order having been made by a justice of the peace. The particulars attached to the order recorded, inter alia, that his existing attack was of a duration of a "few weeks," and that he had threatened to kill sundry people, including his wife.

He was, on entry into hospital, unquestionably a paranoid schizophrenic—and that is still his state. He has suffered from delusions, the most consistent during recent months being that one of the male nurses is hypnotising him. In addition, he suffers from hallucinations in the shape of voices, which—so he says—give him instructions. He has in the past connected these voices with his belief that his wife is unfaithful to him, but now seems to be very vague as to what they say.

He has had many varieties of treatment, including E.C.T. (electro-convulsive therapy) and, since October 9, 1954, doses of the new drug chlor-promazine (the trade name of which is

Largactil), which drug has proved of great value in the treatment of schizophrenia. Unfortunately, he has displayed an allergy to large doses of this drug, with the result that at the present time he is being treated with small doses of this and of two other drugs, each being administered three times daily.

In the past, treatment has from to time resulted in a great improvement in the husband's mental state, but in each case he has suffered a relapse. The most recent treatment—namely, the combination of three drugs, including Largactil—is at the present time showing excellent results, so much so that on July 17, 1959, when Dr. Pentreath, the medical superintendent of Pastures Hospital, who gave evidence on behalf of the wife, visited him, he found him much improved. Thus, although he still insisted that he was being hypnotised and was hearing the voices, he said that he did not bother about them so much.

Dr. Pentreath concluded that although the husband had still very little insight into his condition—the doctor used the word "negligible"—he was better than for a very long time, and that, if his improvement could be maintained to the extent that he became free of the symptoms I have referred to, it was even possible to visualise his discharge at Christmas, provided suitable conditions could be found for him to live outside the hospital.

It is material to remember that Dr. Curran, the senior psychiatrist at St. George's Hospital, London, who gave evidence on behalf of the wife, and Dr. Blair, the consultant psychiatrist at St. Bernard's Hospital, Southall, who gave evidence on behalf of the husband, saw the husband on January 31, 1959, and March 11, 1959, respectively, before the present improvement began.

Having suffered from, and having received treatment for, this disease for over five years, the husband is to be regarded as a chronic case, and until a few years ago no form of recovery could have been hoped for. The drug Largactil has, however, effected an astonishing change in cases of schizophrenia, with the result that, even in chronic cases, a remarkable degree of recovery has occurred and has been maintained.

This degree of recovery has varied from what the doctors describe as "clinical recovery" to the lesser improvement, which they term "social recovery," or, still further down the scale, "semi-social recovery," which they also designate as "much "improved." As I understand the term clinical recovery, it means that the patient can be discharged from hospital, there

1959

WHYSALL v. WHYSALL.

Phillimore J.

being no persisting clinical signs of the disease, and the patient being apparently capable of resuming the normal life which he or she enjoyed before the onset of the disease.

At the lower end of the scale, a semi-social recovery may permit the discharge of the patient—the symptoms of the disease such as delusions and hallucinations having been suppressed—but the degree of recovery being less, the patient is unfit to resume a normal life and may require, at the least, the care and help of a good friend or relative to enable him or her to live outside an institution.

There are, of course, many degrees of recovery between the full clinical recovery at the top of the scale and the semi-social recovery or the condition much improved at the foot of the scale. Social recovery is, as I understand the phrase, a sort of halfway mark.

Dr. Blair, who has conducted a special study covering 132 cases of women who have suffered from schizophrenia for over five years (and can thus be termed "chronic cases"), told me that, as a result of this new drug, 8·3 per cent. had made a full clinical recovery, and 25·8 per cent. what he terms a social recovery, and added that, so far as he is able to ascertain, these cases had maintained improvement. In particular, he spoke of a woman who had spent over 15 years in hospital as a schizophrenic and who, having made a clinical recovery, had been able to return to her husband and her home: this woman has maintained her recovery for over two years. He said, however, that the degree of recovery in the case of men was less satisfactory than in that of women.

All the doctors agree that whatever degree of recovery, whether clinical or semi-social or any intervening degree, the chronic schizophrenic must continue to take doses of the drug Largactil at fixed times to provide against relapse. Thus, no degree of recovery is at present envisaged in these cases which does not involve treatment, albeit in the shape of self-treatment, with Largactil.

In the present case, there is no dispute that the husband is, at the present time, of unsound mind, or that he has been in this state and undergoing treatment for it for over five years immediately preceding the presentation of his wife's petition; but before she can obtain the relief which she seeks under section 1 (1) (*d*) of the Matrimonial Causes Act, 1950, she must discharge the onus of proving that the husband's unsoundness of mind is incurable.

The doctors agreed that in the light of the history of this case

there is no prospect, in the present state of medical knowledge, of a full clinical recovery; but all agree that it was impossible to rule out the possibility of some degree of social recovery which might make it possible to discharge this man from hospital, perhaps as early as Christmas of this year, if suitable conditions of living could be found for him.

On this evidence, counsel for the husband contends that the wife has failed to discharge the burden of proving that the husband's condition is incurable. He urges that, if the degree of recovery enables this man to be discharged and to live a reasonably normal life (which, he asserts, is possible on the evidence), he cannot be regarded as of unsound mind, and that he ought to be regarded as cured, even though he may still require to take drugs to maintain his recovery. He points out that the phrase "incurably of unsound mind" is a term of art—one of those phrases which commend themselves to lawyers rather than to anyone else—and asks me to say what degree of infirmity or unsoundness of mind justifies the conclusion that a man or woman is in that mental state which the law regards as a basis for dissolution of his or her marriage at the instance of the other spouse.

Counsel for the wife contends that even if he attains the degree of clinical recovery, since the husband would still require to take drugs to maintain it, he could never be regarded as cured, and that, on all the facts of this case, I must find that the husband's present condition is incurable within the meaning of the statute.

My task would, of course, be comparatively easy if the doctors were prepared to assess the prospects of a "cure" or to assess the patient's state in terms of "curability" or "incurability," but those are not the terms in which they are prepared to give their evidence. The medical terms "clinical," "social" and "semi-social" recovery are terms which the doctors understand, and which involve a practical criterion against which they can assess the mental state of a patient.

I am faced with the difficulty of reconciling the terms they use with the terms used by Parliament—namely, "incurably of unsound mind." Moreover, I must bear in mind that the modern tendency is to discharge patients from hospital far more freely than in the past. A patient is often discharged where arrangements can be made for his cure outside hospital, and where further treatment is unlikely to improve his mental state, which, nevertheless, few people would describe as normal or cured.

1959

WHYSALL v. WHYSALL.

Phillimore J.

Section 1 (1) (*d*) of the Matrimonial Causes Act, 1950, on which this ground of relief now rests, re-enacts section 2 of the Matrimonial Causes Act, 1937, which first created this ground of divorce in the shape of an amendment to section 176 of the Supreme Court of Judicature (Consolidation) Act, 1925. Neither section has attempted to define the term "unsound mind" or the phrase "incurably of unsound mind," although section 1 (2) of the Act of 1950, in defining when a person of unsound mind shall be deemed to have been under care and treatment for five years, stipulates by subsections (*a*), (*b*) and (*c*) that it involves compulsory detention in a mental institution throughout the period of five years and, accordingly, involves certification. However, by subsection (*d*), the requirement can also be satisfied if the patient was originally detained compulsorily as a result of certification, provided the balance of the five years was passed in an institution as a voluntary patient. This, no doubt, was the factor which induced Sir Boyd Merriman P. to say in *Randall* v. *Randall* [1] that unsoundness of mind must, at least, involve the status of voluntary patient.

The emphasis on detention and, consequently, on certification has been for all practical purposes removed by the provisions of section 1 (1) of the Divorce (Insanity and Desertion) Act, 1958, by which a person is to be deemed to be under care and treatment for the purposes of section 1 (1) of the Act of 1950 "at any "time when he is receiving treatment for mental illness—(*a*) as a "resident in a hospital or other institution provided, approved, "licensed, registered or exempted from registration by any "Minister or other authority. . . ."

It is said that the provisions of this Act make it all the more important to determine what degree of mental infirmity amounts to the unsoundness of mind required to satisfy section 1 (1) (*d*) of the Act of 1950, and what is meant by the word "incurably."

My duty is to give the words used by Parliament their ordinary and natural meaning in the context in which they are used, bearing in mind the purpose of the enactment in which they appear, and any other indication of intention disclosed by the wording of the statute. It is permissible to seek assistance from dictionaries and from the user of these same words by Parliament in other statutes.

I have been referred by counsel to the Lunacy Act, 1890, which was a consolidating Act, whose scheme (as described by

[1] [1939] P. 131, 139; 55 T.L.R. 224; [1938] 4 All E.R. 696.

the authors of the article on Lunatics or Persons of Unsound Mind in Halsbury's Laws of England, 2nd ed., vol. 21, p. 274), is to divide persons of unsound mind into two classes: (1) persons of unsound mind so as to be incapable of managing themselves or their affairs; and (2) persons of unsound mind so as to be incapable of managing their affairs though capable of managing themselves.

Thus, section 90 (1) provides: "The Judge in Lunacy may "upon application by order direct an inquisition whether a person "is of unsound mind and incapable of managing himself and his "affairs."

Section 116 (1), which describes the extent of the powers of management and administration by the judge in lunacy, applies them: (a) To lunatics so found by inquisition. (b) To lunatics not so found by inquisition for the protection or administration of whose property any order has been made before the commencement of this Act. (c) To every person lawfully detained as a lunatic though not so found by inquisition. (d) To every person not so detained and not found a lunatic by inquisition, with regard to whom it is proved to the satisfaction of the judge in lunacy that such person is, through mental infirmity arising from disease or age, incapable of managing his affairs. (e) To every person with regard to whom it is proved to the satisfaction of the judge in lunacy . . . that such person is of unsound mind and incapable of managing his affairs. . . . (f) To every person with regard to whom the judge is satisfied . . . that such person is or has been a criminal lunatic and continues to be insane and in confinement. The succeeding provisions of the Act describe all the above persons as lunatics; the term is thus employed to cover both those found to be incapable of managing themselves and their affairs, and also those who, from mental infirmity or unsoundness of mind, are incapable of managing their affairs although presumably still capable of managing themselves.

Finally, section 341 defines "Lunatic" as "an idiot or person "of unsound mind." The phrase "person of unsound mind" also appears in Forms 1 and 8 in the First Schedule to the Act, where it is treated as synonymous with the term "lunatic." It follows that the phrase "person of unsound mind" as used by Parliament in this Act covers various grades of mental infirmity and, in particular, those whose mental unsoundness or infirmity renders them incapable of managing themselves and their affairs, as well as those merely rendered unable to manage their affairs.

1959

WHYSALL v. WHYSALL.

Phillimore J.

I was referred also to section 20 (5) of the Mental Treatment Act, 1930, passed, it should be remembered, only seven years before the phrase "incurably of unsound mind" was first made a ground for dissolution by the Matrimonial Causes Act, 1937. This provides as follows: "The word 'lunatic' (except in the "following contexts, that is to say, in the phrase 'criminal "'lunatic,' and in relation to persons detained as lunatics outside "England) shall cease to be used in relation to any person of or "alleged to be of unsound mind and there shall be substituted "for that word whenever it occurs . . . the expression 'person of "'unsound mind' 'person' 'patient' 'patient of unsound "'mind' or 'of unsound mind' or such other expression as the "context may require." Here Parliament is equating the term "lunatic" with the phrase "a person of unsound mind."

Some assistance is also to be derived from the Trustee Act, 1850, where by section 2: "The word 'lunatic' is defined as "meaning 'any person who shall have been found to be a lunatic "'upon a Commission of Inquiry in the nature of a Writ *De* "'*lunatico inquirendo*'"—that is to say, found by inquisition—and the expression "person of unsound mind" as meaning "any "person, not an infant, who, not having been found to be a "lunatic, shall be incapable from infirmity of mind to manage "his own affairs." These definitions were applied by Cotton L.J. in the case *In re Martin's Trusts*,[2] where he held that a trustee was of unsound mind when, from continuing infirmity of mind, he was incapable of managing his affairs. The Lunacy Regulation (Ireland) Act, 1871, by section 2, defines a lunatic as "any person "found by inquisition idiot, lunatic, or of unsound mind, and "incapable of managing himself or his affairs." It will be observed that the word "or" is here used in contrast to the word "and" used in section 90 of the Lunacy Act, 1890, a similar variation appearing in the definition of the words "persons of "weak mind" in the same statute. It is curious to observe that section 1 (1) (*b*) of the Divorce (Scotland) Act, 1938, in applying to Scotland the new grounds for divorce introduced in England by the Matrimonial Causes Act, 1937, used the phrase "is incur-"ably insane." As to this, I would refer to the view of Sir Boyd Merriman P. expressed in *Smith* v. *Smith* (*orse. Hand*),[3] in concluding,[4] after reference to the Oxford Dictionary, that no

[2] (1887) 34 Ch.D. 618, 622.

[3] [1940] P. 179; 56 T.L.R. 760; [1940] 2 All E.R. 595.

[4] [1940] P. 179, 181.

distinction is to be drawn between the phrase " unsoundness of " mind " on the one hand and the word " insanity " on the other.

In using the phrase " of unsound mind " in the Acts of 1937 and 1950, Parliament must, I think, have intended to describe a mental state which, assuming that it was incurable, would justify a dissolution of the marriage tie. Although in the comparable law to govern the dissolution of marriages in Scotland the term " insane " is used, it seems unlikely that it was really intended that the law should be different on either side of the border. In the context, and bearing in mind the definitions afforded by the Oxford Dictionary, it must, I think, have been intended to describe a state of mind variously called unsoundness of mind or insanity.

It is always dangerous to attempt to define a phrase such as the phrase " of unsound mind " used in section 1 (1) (*d*) of the Act of 1950. As Sir Boyd Merriman P. pointed out in *Randall* v. *Randall*,[5] there is a great risk that in attempting to define the words used by Parliament fresh difficulties will be created; the result may be to make confusion worse confounded. This view was followed by Mr. Commissioner Latey Q.C. in *Lock* v. *Lock*.[6] In the present case, however, I am pressed by counsel for the Official Solicitor to attempt to do so. He tells me that the Official Solicitor is greatly concerned at the number of cases where a party has been divorced on the ground that he or she is " incurably of unsound mind," and has, thereafter, as a result of further treatment, left hospital fit to resume a normal married life. He points out that, whereas the proviso to the Act of 1950 did at least link the deterioration of the mental condition to past certification, this test has been removed by the Act of 1958. He has also emphasised, in referring to the previous statutes, the very wide range of user to which the phrase " person of unsound " mind " has been attributed by Parliament. Finally, he said that, in the light of the medical evidence in this case, it is not practicable to determine whether the husband is curable of his unsoundness without first deciding what is meant by " unsound " mind." Since the Official Solicitor, in the exercise of his public duty, is concerned in almost all of these cases, I have thought it my duty to attempt to state my opinion.

It is no doubt arguable that since the word " lunatic " and

[5] [1939] P. 131, 137.

[6] [1958] 1 W.L.R. 1248; [1958] 3 All E.R. 472.

1959

WHYSALL v. WHYSALL.

Phillimore J.

the phrase " person of unsound mind " have been used by Parliament to designate cases of so wide a range of mental infirmity, the court in considering section 1 (1) (*d*) of the Act of 1950 ought to adopt an equally broad view. If this argument be right, the categories covered by section 116 (1) (*d*) and (*e*) of the Lunacy Act, 1890, are to be included. Is this right, or ought the court to restrict the relief of dissolution to cases where a spouse is incapable of managing himself and his affairs?

The cases covered by section 116 (1) (*d*) and (*e*) include those who, endowed perhaps with great wealth or cursed by the complexity of their financial problems, may, in their old age, be unable to manage their affairs and yet, since they are still able to understand the extent of their property and the claims to which they ought to give effect, are capable of making a valid will or giving a valid power of attorney. They may also be able, relieved of the burden of their affairs, to continue to live a normal life and, indeed, a normal married life. I cannot think that cases of this sort were contemplated by Parliament in enacting section 1 (1) (*d*) of the Act of 1950. Nor do I suppose that the section was intended to apply to the individual who suffers from the sort of minor degree of unsoundness of mind which may produce eccentricities or harmless delusions.

It seems to me that the intention of Parliament was to enable one spouse to obtain a dissolution of the marriage when the mental incapacity of the other, despite five years' treatment, was such as to make it impossible for them to live a normal married life together, and when there was no prospect of any improvement in mental health which would make it possible for them to do so in the future. The state of mind envisaged was, accordingly, a degree of unsoundness or incapacity of mind properly called insanity. If a practical test of the degree is required, I think it is to be found in the phrase used in section 90 of the Lunacy Act—" incapable of managing himself and his affairs "—provided it is remembered that " affairs " include the problems of society and of married life, and that the test of ability to manage affairs is that to be required of the reasonable man. The elderly gentleman who is no longer capable of dealing with the problems of a " take-over bid " is not, in my judgment, to be condemned on that account as " of unsound mind."

What effect is to be given to the word " incurably " ? If a person may be discharged from hospital in a state in which he can resume married life, managing himself and his affairs, able to

make a will and, perhaps, to enter into contracts or act as a trustee, does the fact that he will always have to take a regular dose of a drug to guard against any recurrence of the disease prevent it being said that he is cured? Mr. Temple's argument would have a patient with this prospect labelled "incurable" even if the hospital were to discharge him as recovered, since, as he says, the prophylactic doses would not be necessary if he was cured.

Likewise, what is the degree of cure involved in a semi-social recovery or discharge with the finding "much improved"? I think assistance is to be derived from the decision of Sir Boyd Merriman P. in *Randall* v. *Randall*.[7] Unfortunately, the facts in that case are somewhat inadequately reported. Incidentally, the first sentence of the headnote is clearly misleading. It is, however, clear that it was a borderline case, since it was, at least, doubtful whether the respondent was of unsound mind at the time of the hearing. Sir Boyd Merriman P., having stated that certification was not necessarily the test, went on to refer [8] to the medical evidence. It was clear that the respondent husband would always suffer what were referred to figuratively as the "scars of the disease" and be subject to an irreducible minimum of unsoundness of mind so that, at best, he could hope to live in a small cottage with a small garden, in circumstances where he would remain technically in detention and subject to recall to hospital. Here, then, was a patient for whom a sheltered life subject to supervision was the utmost that could be hoped for. In this case, which Sir Boyd Merriman P. held incurable, the prospects were, I think, analogous to what the doctors described to me as a semi-social recovery.

In my judgment, the test to be applied to the word "incur-" "ably" is to be applied with common sense and with regard to the popular understanding of the term. In a sense, no doubt, anyone who has suffered a severe disease, mental or physical, cannot be cured in that he cannot expect to enjoy a mind or body as robust or healthy as before. Nevertheless, we regard such a person as cured when he has left hospital and resumed a normal life. The mere fact that he may have to take prophylactic measures to preserve his cure does not, in ordinary language, class him as an invalid. In the physical sphere injections in the case of a diabetic provide a parallel to the largactil which the schizophrenic must always take, even after he is discharged as

[7] [1939] P. 131.

[8] Ibid. 139–140.

1959

WHYSALL v. WHYSALL.

Phillimore J.

" clinically recovered." There will always be borderline cases such as cases where there is a real prospect of relapse at an early date, but if these cases are to be properly assessed, and the interests of the mentally afflicted are to be protected, a practical test must be found, a test which enables a doctor to say with some confidence on which side of the line the particular patient falls.

If a man can hope to resume a normal married life and to manage himself and his affairs, no ordinary person would describe him as incurably of unsound mind or insane because he has to take a drug once a week or once a day. Equally, however, if in the light of medical knowledge at the time of the inquiry it is said that the patient's mental state is such that the best that can be hoped for is discharge to conditions where he will not be required to manage himself or his affairs, but will live an artificial existence protected from the normal incidents and problems of life he will properly be termed incurable. A parallel in the physical sphere is the patient who can go home but who will always be bedridden, whom we would term a permanent invalid. I would conclude, therefore, that in deciding whether a person is " incurably of " unsound mind," the test to be applied is whether by reason of his mental condition he is capable of managing himself and his affairs and, if not, whether he can hope to be restored to a state in which he will be able to do so. I would add to the above test the rider that the capacity to be required is that of a reasonable person.

I turn finally to consider the effect of the view I have formed on the facts of this case. As I have already stated, there is no dispute that the husband is, at the present time, of unsound mind. Is this state incurable, bearing in mind that all the doctors deny the possibility of a clinical recovery and hold out the hope of a semi-social recovery as the best that can be expected? Dr. Blair's assessment was that the husband might hope for a grade lower than social recovery, which he would term " much " improved " or " semi-social recovery." The state of apathy typical of the disease would be likely to persist, and possibly some hallucinations, but he should be able to earn his living and possibly manage some simple financial matters, though this would entirely depend on how he adapted himself. He would always have a scar in the personality so that his personality would never be quite the same as before. Dr. Curran was less optimistic. He took the view that the husband would never be free from latent disease; although

the present symptoms might be suppressed, others would be likely to appear. He would always show lack of emotional responsibility, be lacking in activity, and carry on without volition and with a lack of interest. In short, his opinion was that the husband would always suffer from an irreducible minimum of unsoundness of mind, and that it was not likely that he would be able to earn his own living. Dr. Pentreath, who has known the patient over the years and is really in the best position to judge, thought that, even if the present improvement continued so that the husband could be discharged, he would still remain a withdrawn personality, lacking in volition and spontaneity; suffering from some residual scarring of the mind, he would probably always need some degree of personal supervision by kind friends or relatives, particularly in matters of money.

This man is a chronic case. It it clear that there is no hope of more than a partial recovery, and that this can only enable him to live a life where he is the subject of sympathetic supervision and care. I do not think that it could be said that there is any real prospect of his return to a normal life or normal married life, where he would be able to manage himself and his affairs. He will be apathetic and lacking in volition and will, perhaps, be able to do the work of a labourer but unfit to deal with the simple problem of how to dispose of his wages. I do not think that Parliament intended to treat as cured a man whose optimum prospect of recovery is to be fit for this sort of half-life. I am satisfied, therefore, that I ought to hold that the wife has proved her case that the husband is incurably of unsound mind, and that she is entitled to a decree nisi.

Order accordingly.

Solicitors: *P. Alec Cook, The Law Society Divorce Department (Nottingham); The Official Solicitor.*

E. J.

1959
Oct. 5, 6.

Lord Merriman P. and Phillimore J.

FILDES (FORMERLY SIMKIN) *v.* SIMKIN.

Husband and Wife — Maintenance — Justices — Revocation of order — Earliest date from which revocation can take effect—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39), *s.* 5 (*c*)—*Magistrates' Courts Act,* 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 55), *s.* 76.

A husband, whose wife had obtained a maintenance order against him, arranged for payments under the order to be made to an officer of the court for the wife's use, as provided by section 5 (*c*) of the Summary Jurisdiction (Married Women) Act, 1895.[1] The husband continued these payments after the wife had divorced him and remarried. On her remarriage, the wife ceased to collect the payments, which accumulated in the hands of the court officer. The husband eventually applied under section 53 of the Magistrates' Courts Act, 1952, for the maintenance order to be revoked. The justices revoked the order, and took the view that the sums paid to the court officer since the wife's remarriage should be returned to the husband:—

Held, that the powers conferred on justices by section 76 of the Magistrates' Courts Act, 1952,[2] when revoking a maintenance order, to remit any sum due under the order do not include a power to order such remission to take effect from a date earlier than the date of the complaint applying for revocation. Accordingly, the justices had power to remit to the husband any sum accruing due on or after the date of his complaint, but no power to remit sums paid before that date.

APPEAL from Bolton justices.

A husband, whose wife had obtained a maintenance order under the Summary Jurisdiction (Married Women) Act, 1895, continued to make payments under the order to an officer of the court after

[Reported by D. R. ELLISON, Esq., Barrister-at-Law.]

[1] Summary Jurisdiction (Married Women) Act, 1895, s. 5 (as amended by the Married Women (Maintenance) Act, 1949, s. 1 (1)): "The court "of summary jurisdiction to which "any application under this Act is "made may make an order or orders "containing all or any of the pro- "visions following, viz.:—. . . (*c*) A "provision that the husband shall "pay to the applicant personally, or "for her use, to any officer of the "court or third person on her behalf, "such weekly sum not exceeding five "pounds as the court shall . . . con- "sider reasonable."

[2] Magistrates' Courts Act, 1952, s. 76: "On the hearing of a com- "plaint for the enforcement, revoca- "tion, revival, variation or discharge "of an affiliation order or an order "enforceable as an affiliation order, "the court may remit the whole or "any part of the sum due under the "order."

the wife had obtained a decree absolute of divorce and had, unknown to the husband, remarried. The wife ceased to collect any money from the officer of the court after the date of her remarriage. After about £219 had accumulated in the hands of the collecting officer, he learned of the divorce and of the wife's remarriage. He thereupon paid out to the wife the sum of £78, the amount paid in for the period up to the date of her remarriage, but retained the balance of £141, the sum paid in for the period after the remarriage. The husband made a complaint to the justices that the order be revoked as from the date of the remarriage. The justices made an order in the terms asked for by the husband, the effect of which was that the sum of £141 would have been repayable to him. The wife appealed.

J. G. K. Sheldon for the wife. The magistrates were entitled to discharge the maintenance order and to order that such discharge should take effect from the date of the complaint applying for discharge, but not from any earlier date: *Ruther* v. *Ruther*[3]; *Outerbridge* v. *Outerbridge*.[4] The magistrates were in error in regarding the payments made by the husband between the date of the wife's remarriage and the date of the husband's complaint for the discharge of the order as being a "sum due under the "order" within the meaning of that phrase in section 76 of the Magistrates' Courts Act, 1952, and which they could therefore remit and order to be repaid to the husband. A "sum due" means a sum due, but unpaid, and not a sum already paid.

The husband was not represented.

LORD MERRIMAN P. This is an appeal by a wife from a decision of the Bolton borough justices, who on May 22, 1959, discharged a maintenance order dated February 22, 1952, requiring the husband to pay the sum of £3 per week. The ground on which the order was discharged was that the wife had not merely divorced the husband but had remarried in November, 1957.

About the propriety of the order of discharge no question arises at all, but it is upon the curious situation reached by the operation of the order thus discharged that the present point arises.

The husband, taking advantage of section 5 (*c*) of the Summary Jurisdiction (Married Women) Act, 1895, the Act which is the foundation of the magistrates' jurisdiction, had paid, not to the applicant personally but for her use to an officer of the court,

[3] [1903] 2 K.B. 270.

[4] [1927] 1 K.B. 368; 43 T.L.R. 33.

1959

FILDES
v.
SIMKIN.

Lord Merriman P.

the weekly sum which had been ordered in February, 1952. The fact that she had obtained a divorce against him cannot have escaped the notice of the husband, because he must presumably have been served with the proceedings, and there is no suggestion to the contrary. But apparently nobody knew about the remarriage in 1957 until about £219 had accumulated in the hands of the officer of the court. Attention was drawn to this matter and the officer sent for the wife, in order that he might find out why she was not collecting the money, as she used to do fortnightly. He then learned, as I understand for the first time, not only that she had divorced the husband but also that she had remarried. The result was that he decided to pay over that part of the accumulated money, amounting to £78, which had been paid in before the date of the remarriage, but he kept in suspense the balance, about £141. This is really the sum and substance of the dispute in this case, for the husband, in his complaint to the magistrates' court for revocation of the original order, complained that it should be revoked as from the date of the remarriage in November, 1957. He does not in terms ask for the money to be paid out to him, but the magistrates have taken it that that is the proper effect of his complaint, and the question is whether they had any right to act on the basis that he should be allowed to have the money back.

I must first point out that we have not had the advantage of the husband's presence, or of any argument on his behalf. The case first came on on June 23, 1959, when we adjourned it so that the husband, who is in Ecuador, might come if he were minded to do so; there was a suggestion that he might be here in October. It turns out that he is not here. He has written a letter very similar to a letter he wrote on the previous occasion. Of course he would be glad to have this money, but I gather that he is content to leave that to the court. His real desire is not so much to be heard on that topic as on some fancied claim for defamation of character which has arisen out of his going to Ecuador, as I understand it to be alleged, rightly or wrongly, with some money belonging to the wife. It is manifest that such a matter has no relevance to this appeal. We could not possibly entertain any such question in connection with the issue which it falls to us to determine. We therefore think that no good purpose would be served by adjourning the case till next June, which now appears to be the earliest date when he is likely to be in this country, but that we ought to deal with the matter on the material before

us, and with the assistance of a very admirable statement of the facts and the reasons for their decision by the magistrates.

The magistrates set out the dates of the marriage, which was in May, 1943, of the original order which, as I have already said, was made on February 22, 1952, of the decree nisi, which was pronounced on November 27, 1953 (presumably on the ground of desertion, this having been the ground of the order), and of the making absolute of that decree on January 12, 1954. There follows a recital of the facts; of the collection by the officer of the court; that the wife ceased to call to collect the money after June 4, 1957; that early in 1959 she was asked to call at the court to discuss the matter, which she did; and then the fact of her remarriage on November 30, 1957.

The husband was represented before the magistrates by a solicitor, as was also the wife. The wife's solicitor submitted that there was no jurisdiction to discharge the order retrospectively. At this point I think it is desirable that one should look at the exact wording of the husband's complaint. The complaint was that the order of February, 1952, be set aside, the complainant alleging that since the making of the said order the wife had obtained a decree absolute of divorce and had remarried on November 30, 1957; "wherefore," the complaint goes on, "he "intends to apply to the court to discharge the said order as and "from November 30, 1957."

There is, of course, all the difference in the world between the remarriage as a ground for discharging the order prospectively and accepting the date of the remarriage as the date from which the order should be discharged. The two things are in different hemispheres, and the question really is whether the husband had any right to ask the magistrates' court to do what, in effect, they have done, namely, to discharge the order as from November 30, 1957. I have already referred to the decree of divorce, which was made absolute at the beginning of 1954. It is well settled by *Bragg* v. *Bragg* [1] and a string of cases in this court, and finally in the Court of Appeal, which upheld the propriety of that decision, that divorce per se does not avoid an order in a magistrates' court under the married women's code, if I may so call it. It requires an order of that court, who may, at their discretion, make or refuse to make an order varying or discharging the original order on the ground of the divorce, having considered all the circumstances of the case. I need only add that the Divorce Court

[1] [1925] P. 20; 41 T.L.R. 8.

1959

FILDES v. SIMKIN.

Lord Merriman P.

itself constantly acts upon that basis, and instead of inviting or compelling the parties to go through the procedure necessary, for example, to obtain custody of the children, or maintenance for the wife, or for the wife and children of whom she has the custody, it relies, and encourages the parties to rely, on an existing magistrates' court order. The manifest convenience of that practice has often been alluded to. It saves expense, and certainly in past years afforded much better facilities for enforcement than were available if those matters were brought into the High Court.

I need say no more about that, but it does lead to this reflection. The magistrates have, in effect, acted on what they thought would be better justice (and it is an argument not at all without common sense) to return this money to the husband. Prima facie, it sounds an extremely sensible thing to do. But even so, when we are talking about justice and equity, one has to remember that there is an old maxim that it is only to the vigilant, not to those who go to sleep, that equity lends its assistance. This man went very firmly to sleep in connection with the divorce. He may not have been entitled as of right to get the order set aside, but it would have been a ground on which, if he had chosen to do so, he could have brought the matter before the court. He did nothing, and he continued to do nothing, although he must have known, if he knew anything at all about divorce, that the making of a decree absolute would entitle the wife to remarry. But he has just gone on, in Ecuador, or wherever he happened to be, in blissful unconcern with the constant payments, through his bank or otherwise, to this wife who had remarried.

So there is something to be said about the equitable aspect of this matter, even though it might be thought that in common decency the wife, although under no legal obligation to communicate with the court, would have let her former husband have a postcard to say that she was now remarried and was being supported by a new husband. However, she did not, and we must, therefore, decide this matter on principle.

I know of no authority which enables a magistrates' court to ante-date an order earlier than the date of the complaint. That they are not bound by the date of the hearing, but can date the operation of the order as from the date of the complaint is, I think, perfectly well established, and I do not propose to cite any authorities for that. But when one looks at the Act of 1895 itself, it seems to me to be of the essence of section 5 that the

orders are prospective. Let us examine the things the magistrates have power to do under section 5. First of all, they may make a separation order by providing that the applicant "be no longer "bound to cohabit with her husband"; this is plainly prospective. They may provide that the legal custody of any children while under the age of 16 be committed to the applicant; that, again, is plainly prospective. Then there is the provision to which I have already referred, "that the husband shall pay to the applicant "personally, or for her use, to any officer of the court . . . such "weekly sum not exceeding £2"—the original limit—"as the "court shall, having regard to the means both of the husband "and wife, consider reasonable." Then follows a provision relating to costs.

There is nowhere any indication that an order made on any of the grounds which are set out in section 4, as amended, can be made to operate retrospectively from the date when such ground first arose. On the contrary, I think it is as plain as anything can be that the order, whatever form it takes, is a prospective order, and, as I have ventured to suggest in the course of the argument, it is, so far as I know, unheard of to say that because a husband deserted his wife, say, on January 1 of one year, an order made on January 1 of the succeeding year could be dated back to the date of the desertion. It really is not necessary to follow out the very curious consequences which would result from any such order. To mention only one, it would ipso facto create arrears for 12 months which never became arrears when they were not paid from time to time as those months slipped by. I cannot believe that there is any such power.

There remains to be considered the ground on which the magistrates thought that they had jurisdiction. Founding themselves upon section 76 of the Magistrates' Courts Act, 1952 [His Lordship read section 76], the magistrates held that this sum of £141 is an amount due under the order, and can therefore be remitted. I do not take that view. I think that this section, which is one of a small group of sections numbered 74 to 76 under the heading "Arrears under affiliation order, etc.," refers to the remission of sums due and unpaid, and I cannot find any sort of reference in these sections to sums which have in fact been paid, under the authority of section 5 (*c*) of the Act of 1895, to the court officer on behalf of the wife.

In my opinion, sensible as it may appear to be, this order for the repayment, or for the ante-dating of the revocation and

1959

FILDES v. SIMKIN.

consequent repayment, of the sum of £141 is misconceived, and this appeal must, to that extent, be allowed.

PHILLIMORE J. I agree, and since we are differing from the justices. I would add a few words. The justices have made it clear in paragraph 8 of their reasons that in taking the course they did they were swayed by their opinion of the merits. I confess to some sympathy with them in that view. In seeking to remit the amounts which this husband was liable to pay under the order which the wife had obtained against him, the amounts in question being sums paid to the collecting officer since her remarriage, they sought to found themselves on section 76 of the Magistrates' Courts Act, 1952. As Lord Merriman P. has pointed out, their power under that section was to remit the whole or any part of the sum due under the order, that is to say, any sum which was accruing due, but they had no power whatever to remit sums which had in fact been paid. It is clear that under the provisions of section 5 (*c*) of the Summary Jurisdiction (Married Women) Act, 1895, payment to the collecting officer was equivalent to payment to the wife. He received it for her use and on her behalf.

Further, if it had been intended that magistrates' power to remit should be retrospective, and should extend back beyond the date of any complaint brought by the party seeking remission, then that is something which should have been made clear beyond any possibility of dispute in the wording of the statute. In the absence of such wording it would be quite wrong, in my opinion, for us to put any interpretation on that section which would give it retrospective effect. There is no indication that Parliament intended that the magistrates should have any such power. The sums with which they were dealing, totalling £141, were sums which had been paid under their own order to the collecting officer of the court prior to the date of the husband's complaint.

In taking the view I have expressed I am fortified by observing that this court in *Smyth* v. *Smyth*,[2] when discharging at the instance of a husband an order for maintenance in favour of a wife, discharged it as from the date of the complaint.

For these reasons, I agree that the justices' order, in so far as they sought to remit the moneys due prior to the date of the husband's complaint, should be reversed.

[2] [1956] P. 427; [1956] 3 W.L.R. 210; [1956] 2 All E.R. 476.

1959

FILDES v. SIMKIN.

LORD MERRIMAN P. The result, then, is that the appeal will be allowed to the extent only that the order has been ante-dated to the date of the remarriage. The order will stand in so far as it revokes or discharges the original order. The magistrates dated it from May 22, 1959, which was the date of the hearing. Our judgment is that it should have been ante-dated to May 12, 1959, which is the date of the complaint. But, in fact, nothing turns on those 10 days, because the money which is the subject of the dispute was already, and had long since been, in the court. There is no change in the monetary situation between those dates. Breaking it up in terms of the notice of appeal, so that there may be no misapprehension about it, there is no disturbance of the finding that the order should be discharged, but only of the finding that the sum should be remitted as from November 30, 1957. There will be no order as to costs.

Appeal allowed in part.

Solicitors: *Woodcock, Ryland & Co. for Russell & Russell, Bolton.*

[NORWICH CONSISTORY COURT.]

In re ST. SWITHIN'S, NORWICH.

1959
Feb. 13;
June 22.

J. H. Ellison Ch.

Ecclesiastical Law—Faculty—Lease—Faculty to rector to grant option to take lease—Jurisdiction of consistory court.

Charity—Land held on trust for—Powers of trustees—Incumbent of living—Church vested in him—Whether he has Settled Land Act powers—Court with jurisdiction to approve grant of lease—Application for faculty to consistory court—Settled Land Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 18), *s.* 29—*Charitable Trusts Amendment Act,* 1855 (18 *&* 19 *Vict. c.* 124), *s.* 29.

A faculty was sought to enable the rector, in whom the freehold of a church was vested, to grant to a bank an option to take a lease of the church:—

Held, (1) that section 29 (1) of the Settled Land Act, 1925,[1] did not apply to consecrated buildings and land such as churches

[Reported by D. R. ELLISON, Esq., Barrister-at-Law.]

[1] Settled Land Act, 1925, s. 29: "all land vested . . . in trustees on "(1) For the purposes of this section, "or for charitable, ecclesiastical, or

1959

ST. SWITHIN'S, NORWICH, *In re.*

and churchyards, vested in an incumbent for the duration of his incumbency (post, p. 83).

(2) That the consistory court was not a court of competent jurisdiction within the meaning of section 29 of the Charitable Trusts Amendment Act, 1855,[2] capable of approving the grant by the rector as trustee of the option; accordingly, the court could not entertain the application (post, p. 84).

PETITION for a faculty.

The rector and churchwardens of the parish of St. Swithin, Norwich, jointly with Westminster Bank Ltd., petitioned for a faculty enabling the rector, in whom the freehold of the church was vested, to grant to the bank an option to take a lease of the church. The petition was unopposed.

W. S. Wigglesworth for the petitioners.

The cases cited in argument are referred to in the judgment.

Cur. adv. vult.

" public trusts or purposes shall be " deemed to be settled land, and " the trustees shall, without constitu- " ting them statutory owners, have " in reference to the land, all the " powers which are by this Act con- " ferred on a tenant for life and on " the trustees of a settlement. In " connection only with the exercise of " those powers, and not so as to " impose any obligation in respect of " or affect—(*a*) the mode of creation " or the administration of such trusts; " or (*b*) the appointment or number of " trustees of such trusts; the statute " or other instrument creating the " trust or under which it is adminis- " tered shall be deemed the settle- " ment, and the trustees shall be " deemed the trustees of the settle- " ment, and . . . a separate instru- " ment shall not be necessary for " giving effect to the settlement. . . . " (3) Nothing in this section affects " the jurisdiction of the court, Charity " Commissioners . . . or other com- " petent authority, in regard to the " administration of charitable, eccle- " siastical or public trusts."

S. 51: " (1) A tenant for life may " at any time . . . grant by writing an " option to purchase or take a lease " of the settled land . . . at a price or " rent fixed at the time of the grant- " ing of the option. (2) Every such " option shall be exercisable within " an agreed number of years not " exceeding ten. (3) The price or rent " shall be the best which, having " regard to all the circumstances, can " be reasonably obtained. . . ."

[2] Charitable Trusts Amendment Act, 1855, s. 29: " It shall not be " lawful for the trustees or persons " acting in the administration of any " charity to make or grant, otherwise " than with the express authority of " parliament, under any act already " passed or which may hereafter be " passed, or of a court or judge of " competent jurisdiction, or according " to a scheme legally established, or " with the approval of the board, any " sale, mortgage, or charge of the " charity estate, or any lease thereof " in reversion after more than three " years of any existing term, or for " any term of life, or in consideration " wholly or in part of any fine, or for " any term of years exceeding twenty- " one years."

1959

ST. SWITHIN'S, NORWICH. *In re.*

June 22. J. H. ELLISON Ch. read the following judgment: This faculty suit is promoted by the rector and churchwardens of the parish of St. Swithin in the city and diocese of Norwich, together with the Westminster Bank Ltd., to whom, for the sake of brevity, I shall hereafter refer as "the bank." By their joint petition, dated November 28, 1958, they pray this court to decree a licence and faculty enabling the rector, in whom the freehold is vested, to grant to the bank an option exercisable on short notice at any time during the 10 years commencing at Christmas, 1957, to take a lease of the church for a period of seven years, but determinable by the bank at the end of the first three or five years if they wish, at an annual rent of £225, the bank paying rates and being responsible for internal repairs and otherwise subject to the terms and conditions of a draft lease filed with the petition. The bank would only wish to exercise the option if certain special events arose. In return, the bank propose to pay the rector the annual sum of £75 until the option is exercised or determined, and the arrangement gives them the right to determine by six months' notice after the first three years. Furthermore, the bank would renew the present antiquated electrical installation in accordance with an approved scheme.

I am much indebted to counsel for his assistance in a difficult and somewhat unusual case.

The facts proved by the rector, the Reverend Arthur Richard Freeman, and by Frank Mortimer, a churchwarden, in so far as they relate to the present situation, are briefly these. Since 1871 the benefice has been united with that of St. Margaret's. The union was effected under the Pluralities Act, 1838, but that Act provided for the union of benefices only and not of parishes. The two parishes are still separate and St. Swithin's is strictly the parish church. The separation is, however, purely theoretical, as for many years St. Margaret's and St. Swithin's have in practice been treated and worked as a single parish unit in which reside no more than 40 souls. A service is held each Sunday at St. Margaret's, and evensong once a month, at each of which services the congregation numbers between eight and ten persons. Save for one annual service, St. Swithin's has not been used since 1939 and is redundant and superfluous to present or future foreseeable pastoral requirements. There is no lighting, no heating, in fact it is a liability, and the rector busies himself with another cure of souls elsewhere.

1959

ST. SWITHIN'S, NORWICH, *In re.*

J. H. Ellison Ch.

I also understand that during the war years and for some time afterwards the church was used for the storage of goods by a certain commercial manufacturing company, the bishop having originally approved this under powers conferred by the Clergy (National Emergency Precautions) Measure, 1939, and the regulations made thereunder dated September 3, 1939.

As regards the proposed user of the church by the bank, at an early stage Mr. Wigglesworth made an application that the court should hear his observations and that part of the evidence in camera, on the grounds that questions of the national interest were involved which it would be undesirable to discuss in public. In my judgment, that was the proper course to be taken in the special circumstances. It would, therefore, be inappropriate for me to touch on those matters in detail in this judgment. Suffice it to say that if this court had a jurisdiction, this is a case where I should exercise my discretion in favour of granting the faculty sought. In saying this, no one should think that I am laying down a general proposition that a consecrated building when pastorally redundant may be used as a bank where the public may change their money. I certainly could not approve that. In *Reg.* v. *Twiss* [1] Cockburn C.J. made these strong remarks: "... I do not hesitate to express a very decided opinion that the "doctrine laid down by Dr. Lushington is perfectly correct, that "when ground is once consecrated and dedicated to sacred purposes, no judge has power to grant a faculty to sanction the "use of it for secular purposes, and that nothing short of an Act "of Parliament can divest consecrated ground of its sacred "character. ..." In that case the writ of prohibition was in fact refused and those remarks were obiter. Both before that case, for example in *Campbell* v. *Paddington* (*Parishioners and Inhabitants*),[2] and subsequently, the courts have granted faculties for secular and ecclesiastical purposes combined, provided that the secular purpose is not one of such nature as to be wholly inconsistent with the sacredness of consecration. The principles were fully discussed in *St. Nicholas, Leicester* v. *Langton*.[3] Then there are the later well-known examples of *In re The Parish of Bideford* [4] and *In re St. Mark's Church, Lincoln*.[5] In those cases it was approved that parts of the churchyard could be used for road widening for the benefit of the public generally, and in the later case benefit from such user also accrued to a commercial

[1] (1869) L.R. 4 Q.B. 407, 412.
[2] (1852) 2 Rob.Eccl. 558.
[3] [1899] P. 19.
[4] [1900] P. 314; 16 T.L.R. 540.
[5] [1956] P. 166; [1956] 3 W.L.R. 147.

1959

ST. SWITHIN'S, NORWICH, *In re.*

J. H. Ellison Ch.

omnibus undertaking. In the present case the circumstances are peculiar. The events when a certain type of user by the bank would come into operation are exceptional. I am satisfied that the particular user in those events would not be repugnant to the principles laid down, and would not be wholly inconsistent with consecration.

I now pass to the two more difficult questions which I have to decide. The first is whether the rector has the powers of a tenant for life under the Settled Land Act, 1925, in respect of a church the freehold of which is vested in him, to grant an option of this nature. Secondly, is the consistory court a court of competent jurisdiction under the Charitable Trusts Amendment Act, 1855, able to approve such an arrangement? These are certainly novel points of far-reaching consequence and importance.

The first of those questions turns on the application of sections 29 and 51 of the Settled Land Act, 1925. [The chancellor read them and continued:]

Section 51 clearly applies to those persons upon whom by reason of the provisions of section 29 all the powers of a tenant for life are conferred. The terms of the proposed option fall within the section as regards duration and I am satisfied that the monetary arrangements are the best which could reasonably be made in the present circumstances. But, in my opinion, land vested in trustees for ecclesiastical purposes as referred to in section 29 does not include consecrated buildings and land such as churches and churchyards, which are vested in an incumbent for the duration of his incumbency. To hold otherwise would seem to me to introduce the gravest complications. It is true that to some extent an incumbent holds the land in the capacity of trustee for himself, for his successor incumbents and for the parishioners, present and future, in their respective spheres. The exercise of some of those elements of trusteeship seems to be antithetic to the exercise of some of the powers of a tenant for life. Section 29 (1) expressly confers all the powers of a tenant for life without any reservations, and one such power is that of sale and exchange given by section 38. If an incumbent can grant an option under section 51, why should he not sell the church under section 38? Any notion of sale or exchange is, of course, wholly inconsistent with the incumbent's duty to preserve the church, with its ornaments, furnishings and beauty for posterity, and also with the parishioners' rights at common law to worship in the church and be buried in the parish churchyard. If Mr. Wigglesworth's argument is correct, a curious situation would

1959

ST. SWITHIN'S, NORWICH, *In re.*

J. H. Ellison Ch.

arise by reason of section 29 (3). That subsection provides, in effect, that the jurisdiction of the court, the Charity Commissioners, the Minister of Education or other competent authority is not affected in regard to the administration of (inter alia) ecclesiastical trusts. In the first place it would seem rather curious that Parliament omitted express reference to the ecclesiastical authorities if it intended that the Act should affect the vast number of churches and churchyards within the realm. But by reason of section 113 (1) and (2), the court in that context means the Chancery Division of the High Court and the Palatine Courts of Lancaster and Durham. I do not think that Parliament ever intended that those courts should engage themselves in matters relating to consecrated churches and churchyards, the administration of which has from time immemorial fallen within the jurisdiction of the ordinary exercised through the consistory court.

A further argument was addressed to me which, if I understand it correctly was this. Section 29 of the Settled Land Act, 1925, must be read together with the Charitable Trusts Acts, 1853 and 1855. It was then said that the corporate property of deans and chapters of cathedrals on the one hand, and of certain university colleges on the other hand, would have fallen within the scope of those Acts had they not been expressly excluded by section 62 of the Act of 1853. When one comes to the Settled Land Act, 1925, section 29 (6) expressly excludes the lands held by the university colleges but is silent on the question of lands held by deans and chapters of cathedrals. It is said, therefore, that by implication the Settled Land Act, 1925, applies to property held by deans and chapters. The reason why university colleges were excluded from the Settled Land Act seems to me a simple one, namely, that in the general reorganisation of real property law which took place in 1925, it was more convenient to treat those special matters in a separate enactment passed at the same time, namely, the Universities and College Estates Act, 1925. It is not necessary for me to express any view to what extent the Settled Land Act, 1925, applies to the secular property and lands vested in deans and chapters, such as farm lands or residential property situated within the close; indeed, that is not a matter within the competence of the consistory court to decide. In so far as consecrated land is concerned, ingenious though the argument is, I do not think that it is one of merit, and it certainly does not inspire me to hold that, because consecrated churches are not expressly excluded, therefore, by implication, incumbents

can exercise powers under the Settled Land Act, 1925, in respect of such churches. What I respectfully call the absurdity of the position was illustrated when Mr. Wigglesworth frankly conceded that the argument led by stages directly to the proposition that the dean and chapter of Norwich Cathedral would have an unfettered power to sell the cathedral church, unfettered by reason that the cathedral is, in any event, outside the control or jurisdiction of the consistory court. Although charitable purposes as a rule include both ecclesiastical and public purposes, my view is that in using all three expressions in section 29 (1), Parliament intended no more than to include for that purpose those ecclesiastical and public trusts which are not charitable in the legal sense. For example, it wished to include the case of a gift to a vicar, for distribution among such parochial institutions or purposes as he shall select, which is clearly a trust for an ecclesiastical purpose, but the court has held that the same would not qualify as a charitable trust: *In re Stratton*.[6] Similarly, the vesting of land in an unincorporated society comprising subscribing members, the objects of which are the encouragement of literature, science or art, constitutes a public trust within the section: see *In re Cleveland Literary and Philosophical Society's Land*.[7] Although these are not necessarily charitable trusts, *Oxford Group* v. *Inland Revenue Commissioners* [8] affords another example of a trust for ecclesiastical purposes in the sense of the promotion of religion, but the objects were such that it was held not to be a charitable trust to which taxation relief was available.

I take the view that, had Parliament intended consecrated churches and consecrated land to fall within the scope of the Settled Land Act, 1925, it would have expressly said so, and provided for the detailed administrative matters which would follow as a conseqence.

The second question, namely, whether the consistory court or the chancellor are respectively a court or a judge of competent jurisdiction enabled under section 29 of the Charitable Trusts Amendment Act, 1855, to approve trustees or administrators of charities making certain grants in relation to land comprising the trust, seems to be purely a question of construction. A "court" is referred to in section 9 of the Act of 1855 in connection with persons who refuse to comply with certain requisitions or orders of the board of commissioners. They are deemed to be in

[6] [1931] 1 Ch. 197; 47 T.L.R. 32.
[7] [1931] 2 Ch. 247.
[8] [1949] 2 All E.R. 537.

1959

ST. SWITHIN'S, NORWICH, *In re.*

J. H. Ellison Ch.

contempt of the Court of Chancery, now the Chancery Division of the High Court. The expression " a court or a judge " also occurs in sections 12 and 23 in connection with the transfer of stocks and shares and the holding and payment of moneys, but nowhere in that Act are those words precisely defined. There is no definition section. The Act of 1855 is, by and large, essentially an amending Act, although I am mindful that in *In re Mason's Orphanage and London & North Western Railway Co.*[9] Lindley L.J. expressed the view that section 29 was in fact an additional section to the principal Act of 1853 rather than an amending section. Section 1 provides that the Act and the principal Act of 1853, namely, the Charitable Trusts Act, 1853, shall be construed together as one Act. Turning then to the principal Act one finds a number of different sections conferring jurisdiction upon various courts and judges, depending either on the situation of the charitable trust or on the amount of annual income. For instance, section 28 first refers to the ordinary, special or statutory jurisdiction of the Court of Chancery in relation to charities, and then proceeds to confer on the Master of the Rolls and the Vice-Chancellors in chambers a like jurisdiction if the income exceed £30 per annum. Under section 29 a like jurisdiction was conferred on the Chancellor and Vice-Chancellor of the County Palatine of Lancaster. Later, under the Palatine Court of Durham Act, 1889, a similar jurisdiction was conferred upon that court also. Under sections 32 and 38 of the Act of 1853, the county courts were given jurisdiction if the charity income did not exceed £50 per annum.

In my opinion, a court or judge of competent jurisdiction means the Court of Chancery, now the Chancery Division of the High Court, or one of those courts or judges upon whom jurisdiction is expressly conferred by the Charitable Trusts Act, 1853, and that does not include the ecclesiastical court. It is of interest to observe that in one place the ecclesiastical court is expressly mentioned, namely, in section 11 of the principal Act of 1853, but this is not in a juridical context, but is in connection with certain persons being granted power to examine and search its registers and records. In my judgment, this court cannot entertain the present application, and for the reasons which I have given this petition must be dismissed.

By way of postscript I should like to add these few words. Although I am left in no doubt that I must come to this decision

[9] [1896] 1 Ch. 596; 12 T.L.R. 236.

1959

ST. SWITHIN'S, NORWICH, *In re.*

J. H. Ellison Ch.

as a matter of law, nevertheless, the practical consequences are perhaps unfortunate. It means that this court is unable to assist these parishioners by relieving them of the burden of a redundant church which might otherwise be put to better use by others. I hope that this case may be brought to the notice of the commission now inquiring into the means of disposing of redundant churches. I am not advocating any extension of the Settled Land Act, 1925, or the Charitable Trusts Acts, because I doubt very much whether those branches of statute law are apt media for approaching questions relating to redundant churches. But some extension of the present rather limited powers of the consistory court would unquestionably be of assistance in solving that general problem. St. Swithin's is by no means the first case during my chancellorship where difficulties of a purely legal nature have been experienced, and which have prevented the court exercising its discretion on the merits.

Petition dismissed.

Solicitors: *Milles, Day & Co. for Hansell, Hales, Bridgwater & Preston, Norwich.*

WRIGHT *v.* WRIGHT.

C. A.

1960 *Jan.* 21, 22, 25; *Feb.* 22.

Hodson and Harman L.JJ.; Havers J.

Husband and Wife—Cruelty—Intention to injure—Child of marriage, brutality to—Whether cruelty to wife—Whether intention to injure necessary.

A wife petitioned for a decree of dissolution of marriage on the ground of her husband's cruelty, the cruelty consisting of the husband's punishment of a child of the marriage by beating him over the head and ears with unnecessary brutality, to which he knew his wife was averse, and which the judge found affected her health. There was no evidence that the husband had any express intention to injure his wife's health:—

Held, that in order to establish cruelty it was not necessary to aver or prove an express intention on the part of the husband to injure the health of his wife, and the husband, knowing that his wife intensely disliked his conduct towards the child, must have known that it would injure her health, as it did, and cruelty was established (post, pp. 98, 99).

Squire v. *Squire* [1949] P. 51; 64 T.L.R. 371; [1948] 2 All E.R. 51 (C.A.) applied.

C. A.

1960

WRIGHT v. WRIGHT.

Birch v. *Birch* (1873) 28 L.T. 540 and dictum of Bucknill L.J. in *Kaslefsky* v. *Kaslefsky* [1951] P. 38, 43; 66 T.L.R. (Pt. 2) 616; [1950] 2 All E.R. 398 (C.A.) distinguished.

Per curiam. There is no difference in principle between cases of indecent assault upon a child of the marriage and cases of ill-treatment by beating, the distinction between them being that no evidence is required to establish that an indecent assault was an unjustifiable act, whereas, on the other hand, a petitioner relying upon the beating of a child must show that what was done was more than reasonable chastisement and was unjustifiable (post, p. 98).

Cooper v. *Cooper* [1955] P. 99; [1954] 3 W.L.R. 867; [1954] 3 All E.R. 415 (Divl.Ct.) and *Ivens* v. *Ivens* [1955] P. 129; [1954] 3 W.L.R. 887; [1954] 3 All E.R. 446 (C.A.) considered.

Decision of Wrangham J. affirmed.

APPEAL from Wrangham J.

By an order dated February 6, 1959, Wrangham J. granted a wife a decree nisi of divorce on the ground of her husband's cruelty.

The following statement of facts is taken substantially from the judgment:

The parties were married on June 9, 1935, the wife then being 22 and the husband 27. There were three children of the marriage: Valerie, born on July 30, 1937; Iris, born on May 5, 1940; and David, born on July 8, 1943. Apart from two incidents, one in August, 1935, and the other in July, 1942 (which Wrangham J. and the Court of Appeal thought of no importance), the cruelty alleged by the wife against the husband was the ill-treatment of the two children Iris and David, in the presence of the wife and despite her protests, by beating them on the head and ears with his hand with unnecessary violence and without good reason. This conduct of the husband was alleged to have caused the wife great distress and led to the impairment of her health.

So far as Iris was concerned, the conduct of the husband towards her which was complained of took place while the husband and wife and the children were living in the home of the wife's parents for 12 to 18 months in 1949–1950, which Wrangham J. found was a singularly unwise arrangement. At this time Iris was aged about nine or ten years and slightly obtrusive, and the husband found her rather a nuisance and in his way. Wrangham J. found that the husband would punish her, not maliciously nor with any notion that he was really punishing her, with a smack over the head or the ears—and not one but more than one—for merely being in his way at the time. The judge accepted the

evidence of Iris that at that time she actually became frightened of her father. The wife used to ask her husband to stop, and he refused. The judge thought that the wife was entitled to object to this conduct of the husband, not because it was necessarily cruel but because the husband was not deliberately and thoughtfully punishing the child for her good; he was merely in a fit of temper or irritation hitting the child harder than she should have been hit, and in circumstances in which it was not really justifiable to hit her at all.

The judge, however, regarded the treatment of Iris as of no importance except in so far as it threw light on the character and disposition of the husband in this case, because it did not last for more than 12 to 18 months and had ceased for years before action brought. The Court of Appeal agreed with those findings. The whole case of the wife, therefore, rested on the conduct of the husband towards David between 1950 and July, 1957. By this time the husband and wife and the children had moved to their own home. David was then about eight; and the judge found that the same thing happened with David as had happened with Iris. He got in his father's way and irritated his father. The result of his getting in his father's way and irritating him was that he got continually slapped on the side of the head and on the head.

The judge believed the evidence of Mr. Everitt, the wife's father (whom he thought was a convincing witness), that the way in which the husband treated David went far beyond anything that was reasonable at all. Her father told the husband that this was not the way to punish the boy, but the husband paid no attention. Iris stated in evidence that David was struck with great severity, mostly about the ears or face, and the result was that her mother was very upset. The judge found that the husband was treating this boy in a way in which he ought not to be treated; that he did not confine himself to a single clip on the ear for a naughty boy but was hitting him on the head more than once; that there were occasions when the wife attempted to interfere and was pushed out of the way. He did not believe that these punishments were administered in order to teach the child not to do it again nor for the child's good; they were mere outbursts of ill-temper against a child who had irritated his father, possibly by doing something that was wrong or possibly by doing something that was not really, from the child's point of view, wrong at all. The judge found that this form of treatment was

C. A. 1960

WRIGHT v. WRIGHT.

particularly bad for David because he was a boy who could not stand that type of thing.

The judge did not find proved an allegation that David tried to gas himself with a gas-poker, but he accepted that the boy said, and at the moment believed, that nobody loved him, and that he had a chip on his shoulder, but did not accept that the state of the boy was wholly due to his father's treatment of him. The criticism which the judge made about the father was that if he had been an affectionate and observant father, he would have known about it and noticed it, but instead of noticing it he went on treating the boy in the same way throughout those years.

The judge also found that the husband must have known very well that his wife's health was very likely to have been impaired by his continuance of treatment which she clearly disliked as being harsh, but despite that knowledge that he must have had as to the effect upon his wife he continued in the same course.

Matters went on in this way and by the summer of 1957 the situation was getting worse and worse. Some time in the summer of 1957 the wife said that she heard a noise and banging in the front room and went in and found the husband hitting David very hard about the head and ears again. The wife said that she complained and told her husband that, if the boy had done anything wrong, would he please correct him in the proper manner. He told her to mind her own bloody business and he would do as he liked in his own house and that her bloody parents had spoilt David. He said he would hit the boy where he liked and called the boy "a swine." There was no express finding about this, but the husband said there was an occasion when he said he would strike the boy when and where he liked; he could not recollect calling him "a swine," but he might have said it on that one occasion when he was annoyed.

After this incident the wife consulted her doctor, Dr. Gold, about this matter. She said she went with her husband and that they were both present when the doctor told the husband that he ought not to hit David any more about the head or face. The husband says he went alone, as his wife had told him the doctor wanted to see him. The husband said that from that time he did not strike the boy again. There was no evidence that he ever did. Unfortunately, he never told his wife, because he was annoyed with her for consulting the doctor about David.

During July or early August David went to stay with the wife's parents and while he was there the wife arranged for him to stay permanently with her parents and changed his school.

This annoyed the husband intensely. They returned home without David and there were quarrels on their return. Shortly afterwards the husband and wife consulted solicitors about their matrimonial affairs. On March 6, 1958, the wife filed the petition in this suit for dissolution of marriage, and on March 8, 1958, she left the matrimonial home with Iris and had never returned. Valerie had already left in February, 1958.

Upon these facts the judge held that the wife had established cruelty against the husband. The husband appealed from that decision.

The argument of counsel is only reported on the issue whether the facts found by the judge amounted to cruelty in law.

James Comyn and *R. B. Holroyd Pearce* for the husband. The main ground on which the decree was granted was the husband's behaviour towards David. The judge came to the conclusion that cruelty was established in a " by and large " way, but that is not the way in which cruelty should be established against a man. His behaviour to David was not cruelty to his wife. All that she had to complain of were odd isolated instances of severity to the boy. When the main ground of the charge of cruelty is the husband's conduct towards David, and it is even suggested that his behaviour drove David to imbecility, it is strange that no medical evidence was produced to show that the husband's conduct affected David's health. It is a fatal flaw in the wife's case that no doctor or headmaster was called to say that the child was in bad health.

It is taking matters a long way, in the case of parties who have been married for more than 20 years, to hold that mere harshness to a boy on isolated occasions amounts to cruelty to the wife. It was stated by Sir James Hannen in *Birch* v. *Birch* [1] that violence to a child would only amount to cruelty to the wife if it could be shown that it was done with the express purpose of injuring the wife. That dictum—that cruelty to a child must be shown to have been done with the " express purpose " of injuring the wife—was approved by Bucknill L.J. in *Kaslefsky* v. *Kaslefsky*.[2]

There is nothing in the present case to support an allegation that the husband continued his treatment of David in order to

[1] (1873) 28 L.T. 540.

[2] [1951] P. 38, 43; 66 T.L.R. (Pt. 2) 616; [1950] 2 All E.R. 398 (C.A.)

C. A. 1960

WRIGHT v. WRIGHT.

injure his wife. The case raises acutely the question whether harshness to an adolescent child by his father amounts to cruelty to the wife. Even if the husband were over-severe to the boy, it could only indirectly be cruelty to the wife. In the absence of any evidence of intention on the part of the husband to injure his wife's health, his chastisement of David does not amount to cruelty to the wife.

Stanley Rees Q.C. and *H. S. Law* for the wife. It is a total misconception to describe this as a " by and large " finding, and it is a misnomer to call the cruelty here indirect. The trial judge has found that the wife has established cruelty, and the fact that this court could have decided otherwise is no reason to overrule his finding.

There was in fact evidence to support the judge's finding that the husband's behaviour did affect the wife's health. He was aware that his conduct towards David greatly upset his wife; she had repeatedly asked him not to punish the boy with such severity, but he had nevertheless continued to do so. He must have known that it would result in injuring his wife's health. In *Squire* v. *Squire* [3] it was held that the principle that a person must be presumed to intend the natural and probable consequences of his acts applied to alleged acts of cruelty in matrimonial cases. That case was approved in *Simpson* v. *Simpson* [4] and *Jamieson* v. *Jamieson*.[5]

Allegations of cruelty are not rebutted merely by saying that the husband had no intention of injuring his wife: *Waters* v. *Waters*.[6] It is clear that the violence used by the husband in punishing David was more than was justifiable in the circumstances, and was persisted in with an indifference to the consequences to his wife's health: *Jamieson* v. *Jamieson*.[7]

In cases of cruelty the finding of the trial judge, who heard and saw the witnesses, is of particular value and importance, and, where the judge has not misdirected himself in law, his finding should not be disturbed unless it is obviously unsound: *Watt or Thomas* v. *Thomas*.[8]

Comyn in reply. The intention of the husband is obviously

[3] [1949] P. 51; 64 T.L.R. 371; [1948] 2 All E.R. 51 (C.A.).

[4] [1951] P. 320, 333; [1951] 1 T.L.R. 1019; [1951] 1 All E.R. 955 (Divl.Ct.).

[5] [1952] A.C. 525; [1952] 1 T.L.R. 833; [1952] 1 All E.R. 875 (H.L.).

[6] [1956] P. 344; [1956] 2 W.L.R. 661; [1956] 1 All E.R. 432 (Divl.Ct.).

[7] [1952] A.C. 525.

[8] [1947] A.C. 484; [1947] 1 All E.R. 582 (H.L.).

a material factor; there is here no evidence of any express intention to cause injury to the wife's health or to distress her. It was merely perhaps rather severe punishment, but it was not conduct which amounts to cruelty in law.

Cur. adv. vult.

Feb. 22. HODSON L.J., reading the judgment of the court, stated the facts and continued: Mr. Comyn, for the husband, contended before us: (1) that the facts found by the judge with regard to the conduct of the husband towards David were against the weight of evidence; (2) that the finding of the judge that the conduct of the husband towards David impaired the health of the wife was against the weight of the evidence; (3) that the fact found by the judge that the conduct of the husband towards David gave reasonable apprehension of injury to the health of the wife was against the weight of the evidence; (4) that the judge wrongly drew an inference unfavourable to the husband from the fact that the daughter Valerie was not called as a witness; (5) that the facts found by the judge do not amount to cruelty in law; (6) that on the facts found by the judge, he ought to have drawn an inference that the husband's cruelty to the wife, if any, had been condoned.

The judge had the advantage, which we have not had, of seeing and hearing the witnesses. He made a careful assessment of the credibility of each of the witnesses called as follows: "To "deal with the witnesses called on the wife's side, first, the wife "herself is a very neurotic woman, inclined to exaggerate and "distort facts, but not, I think, capable of telling a flat lie, and "not at all likely to invent an incident for which there was no "foundation at all. There were called on her behalf her daughter, "Iris, whose evidence has been generally accepted as truthful, "and who, in addition, I believe to be accurate; her doctor, whose "evidence naturally I accept as accurate; her father, Mr. Everitt, "who struck me as a sensible man, and whose evidence in "substance I accept; and her mother Mrs. Everitt, a foolish and "malicious woman, whose evidence, except where it is confirmed "by other witnesses, I unhesitatingly reject. On the other side, "the only witness was the respondent himself, who I am satisfied "was doing his best to respect the oath, and who was as candid "a witness as one ever sees in a case of this kind. That does not "mean that I think everything he said was accurate from start "to finish, because it is really difficult for either a husband or a "wife, in circumstances of this kind, where emotions are aroused "and where there is a natural tendency to justify oneself, to be

C. A.
1960
WRIGHT
v.
WRIGHT.

"completely accurate. But I do think he was doing his best, "and I was very much impressed by the way in which, unlike "his wife, he did not fence with questions, but made a great "many admissions which were, in a sense, against his own "interest—though I hope it is not against anybody's interest to "tell the truth."

When an appellate court is asked to disturb the finding of fact in a suit for divorce, particularly on the ground of cruelty, the court must be guided by the decision of the House of Lords in *Watt or Thomas* v. *Thomas*.[1] Lord Thankerton in his speech said[2]: "It will hardly be disputed that consistorial cases form a "class in which it is generally most important to see and hear "the witnesses, and particularly the spouses themselves; and, "further, within that class, cases of alleged cruelty will afford "an even stronger example of such an advantage."

The judge said that, if the case rested upon the evidence of the wife alone, he did not think he would be prepared to act upon it. Her evidence was, however, corroborated by the evidence of Mr. Everitt and Iris, whom the judge regarded as truthful and accurate witnesses. It is true that in 1954 when Dr. Gold saw David he could find no marks upon him. David was never taken to Dr. Gold for examination in 1957 or at any time other than the occasion in 1954. The husband, however, admitted that on perhaps half a dozen occasions he struck David three times for a single fault, though he did not admit that the blows were unduly severe.

Though, as Mr. Rees conceded, this is a border-line case, we do not think that it is possible in this court to disturb the finding of the judge that the treatment of David by the husband was unjustifiable.

[The court reviewed the evidence relevant to the second contention on behalf of the husband, that the finding that the conduct of the husband towards David impaired the health of the wife was against the weight of the evidence, and continued:] We are of the opinion that the finding of injury to health brought about by the husband's conduct was right.

In view of this finding it is not necessary to decide the next question, namely, whether the judge was right in deciding that the conduct of the husband to David gave rise to reasonable apprehension of injury to the health of the wife, if she continued to live with her husband.

[1] [1947] A.C. 484; [1947] 1 All E.R. 582 (H.L.).

[2] [1947] A.C. 484, 488.

The judge commented on the fact that the eldest daughter, Valerie, who knew most of the truth of the matter apart from the husband and wife, had not been called as a witness either by her mother or father. From this he drew the inference that Valerie's evidence, had she been called, would not have supported her mother's evidence, at least in full, and would not have supported her father's evidence either. Mr. Comyn contended before us that the judge was not entitled to draw the inference that her evidence would not have supported the father's evidence. Mr. Comyn could, if he had thought fit to do so, have compelled her to give evidence on subpoena, but in the exercise of his discretion he did not do so. It is clear from the observations of the judge that the inference which he drew was far more adverse to the wife than to the husband, and we do not think that, in so far as he drew any inference unfavourable to the husband, he attached any weight to it.

Mr. Comyn applied to us for leave to call Valerie as a witness before this court. He did not suggest that Valerie could not have been called as a witness at the trial, but stated that at that time she was unwilling to be called. In our view it would be wholly contrary to the practice of this court to allow her to be called in these circumstances, and the application of Mr. Comyn was refused.

The next contention of Mr. Comyn was that the facts found by the judge do not amount to cruelty in law. Mr. Comyn relied upon the passage in the judgment of Sir James Hannen in *Birch* v. *Birch*,[3] a case in which a husband frequently beat one of his children in the presence of the wife with great violence and without cause. Sir James Hannen said[4]: "With regard to the "brutality of the husband towards the child, that cannot be relied "upon. I do not say that it could not be under all circumstances; "because, undoubtedly, if the evidence showed that the violence "was committed upon the child for the express purpose of wounding the feelings of the mother to such an extent as to injure her "health it would amount to cruelty. But there is nothing to "support such a charge in this case. . . ." Mr. Comyn contended, in our view rightly, that there was no evidence of "express purpose" in this case.

Bucknill L.J., in *Kaslefsky* v. *Kaslefsky*,[5] referring to this passage, said[6]: "That is a clear statement that brutality to the

[3] (1873) 28 L.T. 540.
[4] Ibid. 541.
[5] [1951] P. 38; 66 T.L.R. (Pt. 2) 616; [1950] 2 All E.R. 398 (C.A.).
[6] [1951] P. 38, 43, 44.

C. A.
1960
WRIGHT v. WRIGHT.

" child would not amount to cruelty to the wife, unless it were " shown to have been done for the express purpose of wounding " her feelings in such a way as to injure her health. The question " which one has to consider is whether the law contained in that " decision of Sir James Hannen [7] has been modified by the " decision of the Court of Appeal in *Squire* v. *Squire*.[8] I do not " think that the decision in *Squire* v. *Squire* [8] has had that " effect." In a later passage Bucknill L.J. said [9]: " I venture to " think that that is one of the tests which has to be applied: is " the conduct of the wife, unless done for the express purpose " of injuring the health of the husband, innocent in the sense that " it is justified or justifiable under the circumstances? In cases " such as refusal of sexual intercourse, or sheer laziness, or " neglect of a child, I think that is conduct which is innocent, so " far as any charge of cruelty is concerned, unless it is done for " the express purpose of causing injury to the health of the " complaining spouse." Somervell L.J. agreed with the judgment of Bucknill L.J. and with the reasons given by him. Denning L.J. drew a distinction between conduct of one spouse which consists of actions or words actually or physically directed at the other spouse and misconduct of one spouse indirectly affecting the other spouse, such as drunkenness, gambling or crime. He said that in the former case it is not essential that there should be a specific intent to injure or even cause distress: in the latter case such misconduct [10] " can only properly be said to be aimed " at the other when it is done, not only for the gratification of " the selfish desires of the one who does it, but also, in some part, " with an intention to injure the other and to inflict misery on " him or her. Such an intention may readily be inferred from " the fact that it is the natural consequence of the conduct, " especially when the one knows, or it has been brought to his " notice, what the consequences will be, and nevertheless he does " it, careless and indifferent whether it distresses the other or " not."

In *Squire* v. *Squire* [11] the Court of Appeal held that the principle that a person must be presumed to intend the natural and probable consequences of his or her acts is applicable to acts alleged to amount to cruelty in matrimonial causes. It is not, therefore, necessary to constitute cruelty that the conduct complained of should have proceeded from malignity or an intention

[7] 28 L.T. 540.
[8] [1949] P. 51; 64 T.L.R. 371; [1948] 2 All E.R. 51 (C.A.).
[9] [1951] P. 38, 44.
[10] Ibid. 46.
[11] [1949] P. 51.

to harm the complaining spouse. Tucker L.J. cited [12] with approval a passage in the judgment of Shearman J. in *Hadden* v. *Hadden* [13]: "I do not question he had no intention of being "cruel but his intentioned acts amounted to cruelty."

Lord Merriman, in *Simpson* v. *Simpson*,[14] expressed his agreement with *Squire* v. *Squire*,[15] and adhered to that view when sitting in the House of Lords in *Jamieson* v. *Jamieson*.[16] In *Jamieson* v. *Jamieson*,[16] a wife's action in Scotland for divorce on the ground of cruelty, it was held by the House of Lords that averments that the husband had been guilty of conduct calculated to hurt her, and deliberately persisted in with knowledge of the resulting injury to her health, were relevant to go to proof. Lord Normand said [17]: "The Lord President, I think, reaches the "crux of the case when he says [18] that 'where the cruelty is of "'the type conveniently described as "mental cruelty," the "'guilty spouse must either intend to hurt the victim or at least "'be unwarrantably indifferent as to the consequences to the "'victim.' There is room for differences of opinion about what "kinds of case may be covered by the words 'unwarrantably "'indifferent.' I do not propose to go into that because I wish "to avoid the discussion of hypothetical cases and because I am "of the opinion that actual intention to hurt may have in a "doubtful case a decisive importance, and that such an intention "has been averred here. Actual intention to hurt is a circum-"stance of peculiar importance because conduct which is intended "to hurt strikes with a sharper edge than conduct which is the "consequence of mere obtuseness or indifference."

Lord Merriman said [19]: "I fully agree with your Lordships that "the averment of an intention on the part of the husband to impose "his will on the pursuer, and the averment of persistence in his "callous conduct although aware of its effect upon his wife's "health, both of which are plainly made, are important averments "in this case. In saying this, however, I must not be taken to "suggest that either in England or in Scotland it is essential to "impute to the wrongdoer a wilful intention to injure the aggrieved "spouse in order to establish a charge of cruelty." Lord Merriman then expressed his approval of *Squire* v. *Squire*.[20]

[12] [1949] P. 51, 57.
[13] The Times, Dec. 5, 1919.
[14] [1951] P. 320, 333; [1951] 1 T.L.R. 1019; [1951] 1 All E.R. 955 (Divl.Ct.).
[15] [1949] P. 51.
[16] [1952] A.C. 525; [1952] 1 T.L.R. 833; [1952] 1 All E.R. 875 (H.L.).
[17] [1952] A.C. 525, 535.
[18] 1951 S.C. 286, 294.
[19] [1952] A.C. 525, 540.
[20] [1949] P. 51.

C. A.
1960
WRIGHT
v.
WRIGHT.

Lord Reid said [21]: " . . . there can hardly be a more grave " matrimonial offence than to set out on a course of conduct " with the deliberate intention of wounding and humiliating the " other spouse and making his or her life a burden, and then " to continue in that course of conduct in the knowledge that it is " seriously affecting his or her mental and physical health. . . . " What I have said is only intended to apply when a deliberate " intention such as I have described was the cause of the " defender's conduct. Such an intention need not be proved by " direct evidence; it may be inferred from the whole facts and " atmosphere disclosed by the proof. I do not doubt that there " are many cases where cruelty can be established without it " being necessary to be satisfied by evidence that the defender " had such an intention, but I do not intend to decide anything " about such cases. If the defender did not in fact intend to ill- " treat the pursuer, I desire to reserve my opinion whether, or to " what extent, it is necessary or proper to impute an intention " which did not exist by invoking a legal presumption that every- " one must be supposed to intend or foresee the natural and " probable consequences of his acts. . . ." In *King* v. *King* [22] Lord Reid repeated in substance the same observation.

Lord Merriman, in *Cooper* v. *Cooper*,[23] pointed out that Lord Reid was alone in this reservation and said [24]: " Neither " Lord Normand, nor Lord Tucker, who delivered the principal " judgment in *Squire* v. *Squire*,[25] dealt with the point at all, " while, as I have already said, I adhered to my opinion, " expressed in *Simpson* v. *Simpson*,[26] that *Squire* v. *Squire* [27] " was rightly decided." Lord Tucker, in *Jamieson's* case,[28] said: " Every such act must be judged in relation to its attendant " circumstances, and the physical or mental condition or sus- " ceptibilities of the innocent spouse, the intention of the offending " spouse and the offender's knowledge of the actual or probable " effect of his conduct on the other's health (to borrow from the " language of Lord Keith [29]) are all matters which may be decisive " in determining on which side of the line a particular act or " course of conduct lies. For this reason I agree with Lord

[21] [1952] A.C. 525, 548, 549.
[22] [1953] A.C. 124, 140; [1952] 2 T.L.R. 429; [1952] 2 All E.R. 584 (H.L.).
[23] [1955] P. 99; [1954] 3 W.L.R. 867; [1954] 3 All E.R. 415 (Divl.Ct.).
[24] [1955] P. 99, 125.
[25] [1949] P. 51.
[26] [1951] P. 320.
[27] [1949] P. 51.
[28] [1952] A.C. 525, 550.
[29] 1951 S.C. 286, 299, 300.

" Keith [29] that it is, generally speaking, not possible to ' com- " ' partment acts for purposes of relevancy as being gross, so as " ' to constitute cruelty, or less gross, so as not to constitute " ' cruelty.' "

There is a line of cases, beginning in 1901, in which it has been held that indecent assaults on a child of the marriage or of one of the spouses and sexual offences against third parties may amount to cruelty to the innocent spouse, though in committing those acts the husband had no actual intention to injure his wife. These cases were reviewed by Karminski J., who gave the first judgment of the Divisional Court in *Cooper* v. *Cooper*.[30] He began with *Thompson* v. *Thompson*,[31] where the husband debauched the servants in the matrimonial home. He then referred to *Bosworthick* v. *Bosworthick*[32] (a case of indecent assault on little girls), and *Boyd* v. *Boyd*,[33] where Bucknill J. held that an indecent assault on a young girl had not amounted to constructive desertion, but granted a decree nisi for cruelty arising from the same offence.

In *Cooper* v. *Cooper*[34] the husband had been convicted of indecently assaulting a child of the marriage not in the presence of the wife. The wife's summons alleging persistent cruelty to her was dismissed by the justices upon the ground that there was no evidence to show that the assault was committed in the presence of the wife and with the intention of causing his wife pain. The court held that the justices had misdirected themselves on the issue of cruelty and sent the case back to them for a rehearing. The court held that an actual intent to injure is not an essential averment in cruelty, although in a doubtful case it may be of decisive importance. Conduct which is the consequence of mere obtuseness or indifference may nonetheless be cruelty.

This case was followed by the Court of Appeal in *Ivens* v. *Ivens*,[35] where a husband had committed indecent assaults on the wife's daughter by a previous marriage. It was held that a criminal and indecent assault by a husband on a child might amount to cruelty to the child's mother, although no intention to injure the mother was shown. In this case the husband must have known what the effect of his conduct would be on his wife

[29] 1951 S.C. 286, 299, 300.
[30] [1955] P. 99.
[31] (1901) 17 T.L.R. 572.
[32] (1901) 18 T.L.R. 104.
[33] [1955] P. 126n.; 55 T.L.R. 3; [1938] 4 All E.R. 181.
[34] [1955] P. 99.
[35] [1955] P. 129; [1954] 3 W.L.R. 887; [1954] 3 All E.R. 446 (C.A.).

C. A.
1960
WRIGHT v. WRIGHT.

and on her state of health and yet, careless and indifferent to what the effect would be, he continued with his indecent conduct. The facts proved were held to constitute a strong case of cruelty. In his judgment Lord Goddard C.J. referred[36] to *Daniell* v. *Daniell*,[37] where the husband corrected his children by whipping, though his wife objected to any corporal punishment being inflicted upon them. Lord Goddard explained that the reason why the court refused to hold that what was done in that case amounted to cruelty to the wife was because it took the view that the husband was justified in chastising children so long as he did not do it in an unreasonable or brutal fashion.

In our view there is no difference in principle between the cases of indecent assault upon a child of the marriage and cases of ill-treatment of a child by beating. The distinction between them is that no evidence is required to establish that an indecent assault (which, in the words of Lord Merriman, is[38] " directly " relevant to the husband's conjugal relations ") is an unjustifiable act; whereas, on the other hand, the petitioner must show, when she is relying upon the beating of a child, that what was done was more than reasonable chastisement and was unjustifiable. Where the act relied upon is an indecent assault upon a child of the marriage, little if any evidence is required to persuade the court that the husband knew or must have known that his conduct would or would be likely to affect her health. On the other hand, where the wife is relying upon ill-treatment of the child by beating, she must prove facts from which the court should infer that the husband knew or must have known that his conduct would or would be likely to injure his wife's health, but it cannot be necessary to prove that the purpose was expressed in words if that is what is meant by " express purpose " in the judgment of Sir James Hannen which we have cited.[39]

We do not think it is possible to reconcile *Birch* v. *Birch*[40] and the passage in the judgment of Bucknill L.J. in *Kaslefsky* v. *Kaslefsky*[41] to which we have referred with *Squire* v. *Squire*,[42] unless Bucknill L.J. was referring to conduct which was innocent in the sense that it is justifiable in the circumstances.

If the conduct of a husband towards a child of the marriage is unjustifiable, as we find it to have been in this case, it is not necessary to aver or prove an express intention by the husband to

[36] [1955] P. 129, 130.
[37] The Times, Feb. 2, 1954 (C.A.).
[38] [1955] P. 99, 123.
[39] 28 L.T. 540, 541.
[40] 28 L.T. 540.
[41] [1951] P. 38, 43.
[42] [1949] P. 51.

injure the health of the wife. The husband knew that the wife was averse to his conduct, neurotic and anaemic as she was, and must have known that it was likely to cause injury to her health, as it did. We agree with the judge in finding that cruelty was established.

C. A.
1960
WRIGHT v. WRIGHT.

The answer of the husband contained a bare denial of cruelty. There was no plea of condonation. The judge, however, had the duty of satisfying himself that the cruelty had not been condoned, and found that the wife had not condoned the cruelty.

In our judgment this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Warmingtons & Trevor Jones; Barnett & Barnett.*

I. G. R. M.

GRAINGER *v.* GRAINGER AND CLARK.

1959
June 10, 12.
Sachs J.
C. A.
1959
July 6, 7.
Lord Evershed M.R. and Romer L.J.

Husband and Wife—Divorce—Re-marriage of parties to each other—Effect of re-marriage upon custody proceedings in their previous divorce suit—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 26 (1).

Infant—Custody—Divorce Court—Effect of re-marriage of parents upon custody proceedings in their previous divorce—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 26 (1).

After their marriage, of which there was issue one child, had been dissolved the spouses re-married each other. No order for custody was made prior to the re-marriage, an application for custody being adjourned upon certain terms. Shortly after the re-marriage an order was made by consent committing the custody to the spouses jointly. The wife returned soon afterwards to the co-respondent in the divorce proceedings and each of the spouses sought an order for the custody of the child, the summonses being issued in the divorce proceedings:—

Held, per Sachs J. (1) that the order for joint custody, having been made by consent and without consideration of the powers of the court to make such an order, should be regarded as having been made per incuriam and, accordingly, be recited as no longer operative.

(2) That section 26 (1) of the Matrimonial Causes Act, 1950,[1]

[1] Matrimonial Causes Act, 1950, s. 26 (1): "In any proceedings for "divorce or nullity of marriage or "judicial separation, the court may "from time to time, either before or "by or after the final decree, make

1959

GRAINGER v. GRAINGER AND CLARK.

did not confer on the court power to make in former divorce proceedings fresh orders regulating the day-to-day affairs of the parties and their children when once a re-marriage had taken place between the parties, and the summonses should accordingly be dismissed.

(3) That if, contrary to his view, the court had power to deal with the summons, that power should, in the exercise of the court's discretion, only be used in exceptional cases, and the present case was not such a case.

Per curiam: Where a man and woman are husband and wife the relevant ancillary provisions of the Matrimonial Causes Act, 1950, depend for their application on the existence of a matrimonial cause concerning the marriage that made them husband and wife.

Quaere whether the order made upon the adjournment of the application for custody before the re-marriage should be so read as to have ceased to be operative on the date of the re-marriage.

Held, per Court of Appeal, even if the court had jurisdiction under section 26 (1) the judge, in his discretion, was right in not exercising it.

SUMMONS (adjourned into court).

The husband had taken divorce proceedings against the wife on account of her adultery over a period of months with the co-respondent. On March 25, 1958, he was granted a decree nisi which was made absolute on June 26, 1958. An application was made in those proceedings, under section 26 (1) of the Matrimonial Causes Act, 1950, with regard to the custody of the child of the marriage, a young girl, and an order was made on July 25, 1958, by Davies J. that the application be adjourned for a welfare officer's report, and that meanwhile the child should stay with a third party, a sister of the husband, to whom she was to be handed over. He further made an order that the wife was to have certain access. No order for custody was made on that date.

On February 4, 1959, the parties were re-married to each other, no further order having been made up to that date by the court with regard to the child. On February 16, 1959, Davies J. made an order by consent of both parties discharging the order of July 25, 1958, and committing the custody of the child to the spouses jointly. By March 7, 1959, the wife had gone back to the co-respondent. The child had remained with the father and was being looked after by him with the assistance of his mother.

" such provision as appears just with " respect to the custody, maintenance " and education of the children the " marriage of whose parents is the " subject of the proceedings, or, if it " thinks fit, direct proper proceedings " to be taken for placing the children " under the protection of the court."

1959

GRAINGER v. GRAINGER AND CLARK.

No proceedings relating to the present marriage had been initiated, but on April 16, 1959, and May 25, 1959, the husband and wife respectively took out cross-applications as in the old proceedings, each claiming custody of the child and neither suggesting that a third party should have that custody.

The assistance of the Queen's Proctor was invoked in argument and the summons was adjourned into court.

I. Starforth Hill for the husband. The wording of section 26 (1) of the Act of 1950, taken in its literal meaning, does not put any limitations on the period during which orders relating to the children can be made. The wide phraseology—" in any " proceedings "; " from time to time "; " before or after final " decree "—shows that so far as the children are concerned there must be continuity.

Once an ancillary matter is before the court it remains before the court until by consent or otherwise the matter has been dismissed or withdrawn. Re-marriage of itself cannot put an end to a custody order, any more than it would automatically terminate orders relating to settlements or maintenance. This is confirmed by the provisions of section 3 (1) of the Matrimonial Causes (Children) Act, 1958, which gives the court powers to make orders relating to the children even if the petition is dismissed; for this presupposes that the court is seised of these ancillary matters from the date the petition is filed. There remains a continuity even after the death of a petitioner, for the parents of the deceased petitioner can then seek custody. [*Pryor* v. *Pryor* [2] was referred to.]

If, as is submitted, the court still has jurisdiction to make an order for custody in divorce proceedings prior to a re-marriage, then in its discretion it would be proper for such an order to be made in this case, for past history is directly relevant to the present situation, the circumstances are already before the court, and the welfare officer has made a report.

H. E. L. McCreery and *J. W. Miskin*, for the wife, supported the contentions of principle on behalf of the husband.

James Comyn for the Queen's Proctor. This contingency was clearly not in the mind of the legislature; but if the submission that the court can make orders ancillary to previous divorce proceedings between spouses who have re-married is right, it would clearly lead to serious and absurd anomalies. After the second

[2] [1947] P. 64; 63 T.L.R. 208; [1947] 1 All E.R. 381.

1959

GRAINGER v. GRAINGER AND CLARK.

marriage, for example, the wife and children would be able to obtain maintenance without any proof of a matrimonial offence such as wilful neglect to maintain, while the husband might be able to continue to take advantage of the income tax concessions which exist when spouses are divorced. In construing a section of an Act the court should have regard to the objects of the legislature and should, therefore, avoid a construction which is clearly outside those objects.

Although the court has no power of its own motion to bring such orders back to itself, the continuance of such orders is against common sense, for the spouses would in relation to them be treated by the court as if unmarried.

In matters of custody, moreover, the position would arise upon re-marriage that while the child remained an infant the parents might at any time seek to rely upon the old proceedings as a threat instead of dealing with the matters—and there are ample ways in which matters affecting the interests of the children can be dealt with between spouses without recourse to orders made before their second marriage—upon a fresh and realistic basis.

In *Sugden* v. *Sugden*,[3] where the Court of Appeal held that a consent order to pay maintenance for the two children until each respectively attained the age of 21 came to an end on the father's death, Denning L.J. said that an additional reason for so construing the order was to ensure that the court did not go beyond its jurisdiction; and it is submitted that the order of July, 1958, should be construed upon a similar basis, namely, that it came to an end upon the re-marriage. If, however, such orders do not automatically come to an end on re-marriage, then in the exercise of the court's discretion they should be terminated to avoid the anomalies and possible mischief to which reference has been made.

SACHS J. stated the facts substantially as set out above and continued: The question arose as to whether after a re-marriage to each other an application purporting to be made in the old divorce proceedings falls within the ambit of the court's jurisdiction, and, if so, whether the court should in its discretion deal with it or decline to do so.

The questions are of some importance and are not without difficulty. In the present case only a few months have passed

[3] [1957] P. 120; [1957] 2 W.L.R. 210; [1957] 1 All E.R. 300 (C.A.); reversing [1956] 3 W.L.R. 1010; [1956] 3 All E.R. 874.

since the parties re-married each other, but the same question of continuing proceedings in relation to the previous marriage could arise if there was a dispute between the parties many years after such re-marriage. On being informed that there was no authority on this point I adjourned the application for argument in open court, and asked for the assistance of the Queen's Proctor. Mr. Comyn has appeared on his behalf as amicus curiae, and my expression of appreciation for the way in which he presented his submissions is no mere formality.

[His Lordship read section 26 (1) of the Matrimonial Causes Act, 1950, and continued:] It seems to me right first to assume (though the accuracy of the assumption depends upon the exact meaning of the words "proceedings for divorce" to which I will later refer), that this is an instance where, on the literal and grammatical meaning of the words, they would, if taken by themselves, be construed as if they did not limit the period "after the final decree" by reference to any specific event, and in particular as if on such a literal construction the re-marriage thus would not affect the position. Such literal and grammatical constructions of general words do not, however, of themselves solve the problem. It is axiomatic that words and phrases used in a statute must (as stated in Maxwell on the Interpretation of Statutes, 10th ed., p. 52) "be construed not according to the "mere ordinary general meaning of the words, but according to "the ordinary meaning of the words as applied to the subject-"matter with regard to which they are used." To quote another apt phrase, appearing at p. 18 of the same work: "General "words admit of indefinite extension or restriction, according to "the subject to which they relate, and the scope and object in "contemplation."

These canons of construction have been applied more than once to provisions of the Matrimonial Causes Acts on questions relating to the general jurisdiction of the court and to the court's powers to make ancillary orders in particular. The result of their application to some novel but broad point which has not previously been construed is, however, not infrequently a matter of general impression formed upon looking at the wording of the particular section against the background of the contents of the Act as a whole: and thus authorities on other specific words in other sections may prove of little help. That seems to me to be the position here.

The present case simply concerns the powers of the court to make variable ancillary orders (by "variable" I mean capable

1959

GRAINGER v. GRAINGER AND CLARK.

Sachs J.

of variation from time to time) regulating the day-to-day affairs of the parties. But the relevant provisions of the Matrimonial Causes Act, 1950, in that behalf must obviously be read in relation to the Act as an entirety, having due regard, of course, to its history. Against that background it seems clear that so far as divorce proceedings are concerned, the subject-matter with which the legislature was dealing in that Act, as in its predecessors, was the provision of powers to make, in relation to those day-to-day affairs, appropriate orders during the period whilst the cause is pending, and then, where a decree absolute results, during the further period whilst the parties are no longer husband and wife. The legislature does not appear either to have contemplated, or to have intended to deal at all with that quite different position and period, which for convenience I will call the third period, that supervenes when the parties have re-married each other and are once more husband and wife. The general scheme of the relevant provisions is indeed not apt to deal with that third period, which to my mind simply is not its subject-matter.

On that broad ground it is my view that the Act of 1950 does not confer on the court by section 26 (1) power to make in the old divorce proceedings fresh orders regulating the day-to-day affairs of the parties and their children when once a re-marriage has taken place between the parties. It is a ground that may perhaps also be properly expressed by stating that where a man and woman are husband and wife the relevant ancillary provisions of the Matrimonial Causes Act, 1950, depend for their application on the existence of a matrimonial cause concerning the marriage that made them husband and wife.

The fact that orders of a different nature, be they in relation to status or property, made in the periods between the initiation of the divorce proceedings and the re-marriage are unaffected by that re-marriage does not touch the point whether thereafter fresh day-to-day orders can be made.

Arguments in support of jurisdiction were bound to concede, and for the most part did concede, that the third period was thus obviously one which the legislature had not had in mind: that one could not hold that the court had the suggested jurisdiction without producing a situation that flew in the face of common sense: and that the anomalies which would result are numerous. As regards those anomalies, to take an example, it was conceded that of all husbands only those that had re-married the same wife (either once or more than once) could be ordered by this

court under its Matrimonial Causes Act jurisdiction to pay to their wives or infant children maintenance without proof of wilful neglect and without there being any proceedings in this court touching the existing marriage. Moreover, it was conceded that orders made in the old divorce proceedings for the maintenance of the wife and infant children could, and in the absence of fresh orders normally would, continue in force after the re-marriage and indeed could thereafter still be freshly made in the old divorce proceedings.

Mr. Comyn further pointed out that the continued existence of a pre-re-marriage order against a parent in favour of a child would result in the parent and child both continuing to obtain tax benefits—a revenue point which may be of doubtful relevance to the issue before me, but one to which Mr. Comyn very properly drew special attention in view of the fact that the court had no power of its own motion to bring back to itself an order of this kind.

In general it was, in effect, conceded in argument that if the suggested jurisdiction existed, the Matrimonial Causes Act, 1950, gave power to the court to treat this particular husband and this particular wife in relation to day-to-day matters as if they were not in fact husband and wife. All these absurdities, it was submitted, must be held to be produced because of the literal and grammatical construction of the words. The court's duty, it was argued, was to hold that the jurisdiction existed and then to mitigate the position by refraining from exercising that jurisdiction save on limited occasions.

It was also pressed on me that the benefit in certain exceptional cases to an infant of continuity in the court's control was such that the literal construction should be adopted.

If I do not refer in turn to each of the other parallel points addressed to me in favour of jurisdiction, I am sure that counsel will not infer that they have been overlooked. I would, however, mention, as regards such of the submissions as were founded on the inconvenience in certain exceptional events of holding that there was no jurisdiction, that where the court has to consider two opposing constructions of a section, one of which produces a particular inconvenience and the other a general absurdity, the arguments founded on the particular inconvenience must normally give way to those founded on the general absurdity.

On the broad ground already stated, the above arguments in favour of jurisdiction were not accepted. One narrower

1959

GRAINGER v. GRAINGER AND CLARK.

Sachs J.

point against jurisdiction is, however, also worth mentioning—albeit with some hesitation because of the confusingly different expressions (to which Mr. Comyn helpfully directed my attention) used in the various sections and subsections of the Act to indicate exactly in what circumstances the court's power to make orders arises. I would doubt if the words "proceedings "for divorce" in the initial phrase governing the whole of section 26 (1) could, in any event, refer to proceedings between two parties who are husband and wife other than proceedings which concern an existing marriage between them. I would, accordingly, not in any event be disposed so to construe them in the present case as to cover the proceedings which form the subject of the present application.

If, however, the construction of the statute I have adopted is not correct, the question arises how the court should, in its discretion, deal with applications in the old proceedings to make fresh orders regulating the day-to-day affairs of the parties and their children. In the circumstances it seems desirable to refer further to that point in so far as it concerns the present applications.

In relation to such a discretion questions of general policy were discussed. On the one hand emphasis was laid on the possible interests of the child, and on the other hand there was stressed the evil of it being possible during the second marriage for the parties for a decade or more afterwards to be able to raise as between each other the threat of reviving the old proceedings on a variety of matters.

In relation to the interests of the child it seems to me that those are well provided for by the ability of the parties to resort, if any necessity arises, in the normal way as parents, to the various courts, which include those to which the legislature has provided access under more statutes than one. Of those courts some are relatively inexpensive in comparison with the High Court—though if for some reason it were considered of special advantage to come to the High Court, and to this Division of it in particular, then proceedings of one type or another could easily be initiated. As regards the relationship between the husband and wife, however, the idea that the re-marriage should remain bedevilled by the continued existence of the old proceedings, or possible threats of reviving them at any moment, is overridingly repugnant to my mind. Accordingly, the court should, in my view, lean heavily towards letting that re-marriage start with

that clean slate which propriety demands, which alone can, as a rule, provide a foundation for the hopes of any re-marriage being successful, and which, so far as the parties are concerned inter se, must be implicit in their very re-marriage. The court could thus generally remit husband and wife to such procedure as would normally be applicable in the case of a married couple.

The present applications are made by legally aided parties who live in Hampshire. The judge who dealt with the matter in July, 1958, is no longer a member of this Division and, moreover, made the interim order simply upon reading affidavit evidence and hearing arguments thereon. The affidavits filed in the applications now before me very properly do not pray in aid any earlier affidavits, the contents of which relate almost entirely to past history that cannot be usefully revived, and which, if it were necessary to revive it, would have to be the subject of cross-examination.

Having read all the papers, it seems to me that this must prove to be one of those relatively clear-cut matters which will be decided in substance upon facts which are common ground, coupled, of course, with the help of Welfare Officers' reports, existing or future. There is no question here of continuity of judicial control and no overriding reason why one court rather than another should deal with the present issue.

On the basis of the approach indicated above to the question of discretion I would, had there been jurisdiction, have thus been disposed to remit the parties in the present case to the normal procedure for a married couple between whom no matrimonial cause was pending: I would also have been much disposed to say that they should adopt some less expensive method of dealing with the issue between them than that of resorting to the High Court.

There remains the question as to what course could be adopted as regards the order dated July 25, 1958, and nothing I am about to say is intended to refer to other orders drawn differently or dealing with other matters. Prima facie, this order should, if practicable, be so construed as to ensure that it is in conformity with, and does not exceed, the jurisdiction of the court: cf. Denning L.J. in *Sugden* v. *Sugden*.[1] It may well thus be that the order of July 25, 1958, should be so read as to cease to be operative after re-marriage; but whether or not that order thus ceased to have effect on the date of the re-marriage,

[1] [1957] P. 120, 134.

1959

GRAINGER v. GRAINGER AND CLARK.

Sachs J.

or alternatively ceased by virtue of the order of discharge made by Davies J. on February 16, 1959, it seems desirable that there should be embodied in the order now to be drawn a recital that the old order is no longer operative.

As regards the order of Davies J. of February 16, 1959, giving the parties joint custody after the re-marriage, this was a consent order made on an occasion when no point was raised as regards the court's powers. In so far as it is on the face of it a fresh order for custody after re-marriage it seems to me that it should be treated as made per incuriam and should also be recited as being no longer operative.

With those additions to the normal form of order these two applications should accordingly be dismissed.

Summonses dismissed.
No order as to costs inter partes.
J. B. G.

The husband appealed.

I. Starforth Hill for the husband.
J. B. S. Edwards for the wife.

July 7. LORD EVERSHED M.R. stated the facts and continued: Notionally (if I may use that adverb), the husband has appealed; but the wife, as respondent, appears to support the view of the husband; so that we have not had the advantage of any argument upon the jurisdiction point or the discretion point in the other direction.

[His Lordship read section 26 (1) of the Matrimonial Causes Act, 1950, and continued:] It has been the argument of Mr. Hill in this court that there is ex facie no limit imposed by the formula "In any proceedings for divorce . . . the court may "from time to time . . . after the final decree": so, he says, it follows, even though it strikes the mind at first sight as startling, that since the marriage which was the subject of the proceedings when they started has not only been dissolved but has been superseded by a re-marriage between the same parties, one may still invoke jurisdiction in the proceedings for an order as to custody, the parties being then husband and wife—father and mother of the child—in respect of whose marriage at the time of the application no proceedings whatever are pending.

The judge, in a careful judgment, came to the conclusion that, even though at first sight the language grammatically might

involve a jurisdiction, still the general sense and tenor of the section denied it. He said [1]: "It is a ground that may perhaps "also be properly expressed by stating that where a man and "woman are husband and wife the relevant ancillary provisions of "the Matrimonial Causes Act, 1950, depend for their application "on the existence of a matrimonial cause concerning the marriage "that made them husband and wife." I am strongly disposed to agree with that general view of the scope and purpose of the legislation. The judge went on to point out that, if the jurisdiction existed, anomalies of a somewhat startling character would arise. He observed (for example) that an order in what he called "the old divorce proceedings" might be made against the husband for maintenance; and he pointed out also (though counsel for the wife questions whether it is right) that before him it was conceded that maintenance might be ordered as respects infant children without any proof of wilful neglect or there being any proceedings before the court touching the existing marriage. He referred to other apparent absurdities; and the existence of those anomalies and absurdities confirmed his general view of the scope and purpose of the Act so as to lead him to conclude that there was now no jurisdiction in these proceedings under the Act to make the orders which both parties sought.

In the course of the argument I felt myself also somewhat influenced in the same direction by the use of the language "the "children the marriage of whose parents is the subject of the "proceedings"; for it seemed to me that if you look at the relevant date when the application for the order is made, it cannot be said that the marriage of the child's parents is the subject of the proceedings; because there are no proceedings whatever touching the marriage now existing between the parents of the child. Mr. Hill, on the other hand, pointed out that the use of the present tense should not be taken as indicating that the test was to be applied by looking at the date when the application was made and at the marriage then subsisting. And it is true to say that these proceedings (assuming they are still for any purpose on foot) certainly did relate to the then existing marriage between the parents of the child.

I have indicated that my present inclination favours the view—on this point—of the judge. But I am content not to express,

[1] Ante, p. 104.

C. A.
1959
GRAINGER v. GRAINGER AND CLARK.
Lord Evershed M.R.

and do not express, any concluded opinion upon it, because I am quite satisfied that there is no good ground shown for this court interfering with the judge's discretion, which was exercised adversely to the use of any jurisdiction which might reside in him.

It was said by Mr. Hill that the discretion was, so to speak, coloured by the view that the judge had already taken about jurisdiction. But I see no ground for so supposing. The judge began this part of his judgment by saying[2]: "If, however, the construction of the statute I have adopted is not correct, the question arises as to how the court, in its discretion, should deal with applications in the old proceedings to make fresh orders regulating the day-to-day affairs of the parties and their children"; and a little later his language was as follows: "As regards the relationship between the husband and wife, however, the idea that the re-marriage should remain bedevilled by the continued existence of the old proceedings, or possible threats of reviving them at any moment, is overridingly repugnant to my mind." That is a ground for the exercise of the discretion which is in no sense coloured by the jurisdiction point, but is one which I venture heartily to endorse. I think it is contrary to common sense and public policy—certainly in this case—that, if there be jurisdiction, it should be exercised; and I therefore agree with the judge that, if jurisdiction does exist, nevertheless all he should do was to make the order that he did, expressing the fact that the existing orders made by Davies J. on July 25, 1958, and February 16, 1959, should be treated as no longer effective. The order of Sachs J. states: "It is declared that the orders [of the dates I have mentioned] are no longer operative."

For those reasons, therefore, I would dismiss the appeal. I only add that, as the judge pointed out (and it is obviously relevant if this unhappy state of affairs between the two people is to continue), the order that we make, affirming Sachs J., is by no means a negation of rights to go to other places to get relief. Both parties before us are legally aided; but upon that matter I make no further comment. I would dismiss the appeal.

ROMER L.J. I agree; and have very little to add. I think that the question of jurisdiction is a difficult one, depending primarily, as it does, on the construction of section 26 of the Act of 1950.

[2] Ante, p. 106.

It seems to me that the words, in section 26 (1), " the marriage of " whose parents is the subject of the proceedings " were manifestly directed primarily to the marriage which subsisted between the parties when the proceedings were initiated; and the question is really whether they were exclusively so directed. It could be said that there is now a new marriage subsisting, and that " the " proceedings " cannot really be regarded as applying to that marriage—that the existing marriage is no longer the marriage which was " the subject of the proceedings."

In the course of his judgment the judge said[3]: " I would " doubt if the words ' proceedings for divorce ' in the initial " phrase governing the whole of section 26 (1) could, in any " event, refer to proceedings between two parties who are husband " and wife other than proceedings which concern an existing " marriage between them." I content myself by saying that I share that doubt. But it is not necessary to arrive at or express any conclusion upon the matter, because I entirely agree with the manner in which the judge dealt with the exercise of the discretion which, on the hypothesis that he had got jurisdiction, was vested in him, and which led him to refuse to make an order. The passage to which the Master of the Rolls has referred in his judgment dealing with that aspect of the matter, in which the judge said: " . . . the idea that the re-marriage should remain " bedevilled by the continued existence of the old proceedings, or " possible threats of reviving them at any moment, is overridingly " repugnant to my mind," carries great conviction; and I cordially and entirely agree, on that and on other grounds, in relation at all events to this particular case, with the approach that the judge made to this question of discretion.

Accordingly, basing myself on the question of discretion and leaving the question of jurisdiction open until a case arises in which it may become necessary to decide it, I agree that this appeal fails.

Appeal dismissed. Taxation of costs of husband and of wife under Third Schedule, Legal Aid and Advice Act, 1949.

Solicitors: *Batchelor, Fry, Coulson & Burder for Foster, Wells & Coggins, Aldershot; Waterhouse & Co. for Dutton, Makin & Co., Winchester; Queen's Proctor.*

E. D.

[3] Ante, p. 106.

1959
July 30;
Oct. 21.

Stevenson J.

HOBBS *v.* HOBBS AND COUSENS.

Practice — Discovery — Privilege — Professional privilege — Taxation of costs—Privilege attaching to brief—Divorce.

On the taxation of the petitioner's bill of party and party costs in a suit in which he had been awarded costs against the co-respondent, the co-respondent asked to be allowed to inspect the brief in order to be able the better to contest the item in the bill relating to "instructions for brief." On a reference by the taxing registrar to the judge for directions:—

Held, (1) that the co-respondent was not entitled to inspect the brief upon taxation, for the document remained protected by legal professional privilege.

(2) That it was, however, the duty of the taxing registrar closely to scrutinise the contents of the brief; and the co-respondent was not prevented from contending before him that the sums claimed were excessive.

Per curiam. If someone in the position of the co-respondent were permitted to see the contents of the petitioner's proof it would have the most intolerable consequences in the Divorce Division in view of the ancillary matters which often remain to be determined after decree absolute.

Summons (adjourned into court).

The husband by his petition, in which he prayed for the discretion of the court in his favour, had alleged adultery between his wife and the co-respondent. That adultery had been denied; and the wife, who also asked for the exercise of the court's discretion to grant her a decree, alleged cruelty in her answer. On February 10, 1959, Mr. Commissioner Edgedale granted the husband a decree nisi, which was made absolute on May 12, 1959, and made an order that the co-respondent should pay the costs of the suit.

The petitioner's bill of costs was lodged for taxation in the usual way and it included two substantial items, namely, £228, which was the expense of the petitioner coming to this country from Dar-es-Salaam for the trial, and an item of "instructions "for brief," amounting to two hundred guineas.

The taxation took place on various days in May and June, 1959; and in the course of it the co-respondent, who was by that time acting in person and who appeared before the registrar to resist the taxation of costs against him, asked to be allowed to inspect the brief which had been delivered to counsel for the petitioner in order that he might contest items in the bill, particularly the two hundred guineas for instructions for brief.

Mr. Registrar Townley Millars referred to the judge the question whether a litigant in the position of the co-respondent should be permitted to inspect the brief on the other side.

The assistance of the Queen's Proctor was invoked in argument.

James Comyn for the Queen's Proctor. Although the co-respondent's proposition is reasonable on the face of it, namely, that he is being asked to pay for something and should therefore see what it is, the brief and accompanying documents are privileged. The same problem arises in all three Divisions; but while in the Queen's Bench Division an action comes to an end after judgment, in divorce proceedings it is different. It would, for example, be intolerable if matters affecting children and maintenance referred to in a brief were open to inspection upon taxation. But the question of privilege in relation to briefs is equally applicable in all Divisions, and the privilege which is claimed in affidavits of documents pending suit lasts for ever. The brief and accompanying papers are only open to inspection when they are laid before the taxing officer, and he is the final arbiter. But there would appear to be no direct authority upon the matter in issue here. The principles on taxation are based on R.S.C., Ord. 65, and rule 68 of the Matrimonial Causes Rules, 1957. [Rayden on Divorce, p. 1163, was referred to.] In effect all documents are to be produced before the taxing officer on taxation.

In *Curtis* v. *Beaney* [1] it was alleged in a probate action that the deceased had not been of sound mind; and it was suggested that a similar defence was considered in an action during her lifetime in the brief in those proceedings. Bargrave Deane J. held that that brief, confidentially prepared for the use of counsel, was privileged. Privilege, however, was held in *Jones* v. *Great Central Railway* [2] not to extend to documents passing between a member of a trade union and union authorities with a view to assistance in legal proceedings upon the basis that it was confined to communications between the client and his legal advisers or their agents, although quaere whether a similar decision in such a case would be reached today. [Reference was made to Halsbury's Laws of England, 3rd ed., vol. 12, pp. 39, 44 and 59, as to matters covered by professional privilege, and to vol. 15, p. 420, as to privilege in evidence.] In *Walsham* v. *Stainton* [3]

[1] [1911] P. 181; 27 T.L.R. 462.
[2] [1910] A.C. 4.
[3] (1863) 2 H. & M. 1.

1959

HOBBS v. HOBBS AND COUSENS.

the reports of an accountant called in by a solicitor were held privileged upon the basis that he must be considered as acting as the clerk of the solicitor, as were the drafts of pleadings and observations upon the briefs; and in *Nicholl* v. *Jones* [4] all notes and observations made by counsel, and all instructions, were also held privileged (although the endorsement of the court's order was not).

It is, accordingly, submitted that such briefs are completely and permanently privileged against all persons except the taxing officer.

"If any matter be disclosed to an attorney in the cause, he "cannot be permitted to give it in evidence, either in that or any "other action. It is the privilege of the client and not of the "attorney; but such privilege is confined to counsel, solicitors "and attorneys, when acting in their respective characters": *Wilson* v. *Rastall*.[5] "It is not sufficient to say that the cause "is at an end; the mouth of such a person is shut for ever." For documents to be privileged it is sufficient if one of their purposes was their submission to a solicitor for use in anticipated litigation, even if that purpose was not the dominant or substantial one for their existence: *Seabrook* v. *British Transport Commission* [6] (where the documents concerned were accident returns and reports relating to the death of the plaintiff's husband), distinguished in *Longthorn* v. *British Transport Commission* [7] (which related to the report of an inquiry at which the plaintiff had given evidence into the causes of an accident). [Reference was also made to an article in The Law Times, vol. 228, p. 50, where it is stated that there are no other cases directly on the point in the books.]

J. G. Wilmers for the petitioner. The argument for the Queen's Proctor is adopted. Although the privilege can be waived, "it is the privilege of the client and not of the adviser. "The adviser, therefore, is bound to claim the privilege unless "the clients have waived it": see notes to R.S.C., Ord. 31, r. 1, (1960), p. 687. The principles on which privilege is based are stated in the judgment of Jessel M.R. in *Anderson* v. *Bank of Columbia* [8] (where a communication between bank officials giving particulars of a transaction in issue were held not to be

[4] (1865) 2 H. & M. 588.
[5] (1792) 4 Term Rep. 753, 759.
[6] [1959] 1 W.L.R. 509; [1959] 2 All E.R. 15.
[7] [1959] 1 W.L.R. 530; [1959] 2 All E.R. 32.
[8] (1876) 2 Ch.D. 644, 648 et seq.

privileged). The privilege extends to communications made before any litigation is in contemplation: *Minet* v. *Morgan*.[9]

Mostyn v. *West Mostyn Coal and Iron Co.*,[10] *Knight* v. *Marquess of Waterford*[11] and *Bolton* v. *Corporation of Liverpool*[12] are further authorities on the privilege attaching to briefs and cases laid before counsel. Once a document is privileged, it is privileged for all time: *Wilson* v. *Rastall*.[13] The privilege, for example, extends a fortiori "where a succeeding action is substantially the same as that in which the documents were used "... the fact that this position (as plaintiffs and defendants) is "reversed can make no differences with regard to this privilege": *Bullock & Co.* v. *Corry & Co.*[14] (where the action concerned a claim for not unloading a cargo of rice at the port of discharge), *per* Cockburn C.J. In that case Mellor J., who also refused to hold that the communications on the previous action were not privileged, observed that he was glad that their decision was in conformity with the practice of the Court of Equity. See also *Calcraft* v. *Guest*,[15] where Cockburn C.J. held that the position was covered by *Minet* v. *Morgan*,[16] and in which the documents in question related to an action arising from a dispute over certain fishing rights over a hundred years previously (although that privilege did not extend to copies of the documents and secondary evidence thereof might, accordingly, be admissible). This principle applies even though the documents related to previous proceedings in an action which did not proceed beyond delivery of defence: *Pearce* v. *Foster*.[17] [*Schneider* v. *Leigh*,[18] where extracts of a medical report, which were considered defamatory, had been communicated, was also referred to.]

A parallel to the right of the taxing officer to inspect documents upon taxation is to be found in the observation in Halsbury's Laws of England, 3rd ed., vol. 12, p. 38: "The Court may "inspect the documents for the purpose of deciding the validity "of the claim" to privilege.

The co-respondent in person.

STEVENSON J. stated the facts substantially as set out above and continued: At first sight it seems not unreasonable that

[9] (1873) L.R. 8 Ch. 361.
[10] (1876) 34 L.T. 531, 532.
[11] (1836) 2 Y. & C.Ex. 22, 36.
[12] (1833) 1 My. & K. 88, 93.
[13] 4 Term Rep. 753.
[14] (1878) 3 Q.B.D. 356, 358.
[15] [1898] 1 Q.B. 759.
[16] L.R. 8 Ch. 361.
[17] (1885) 15 Q.B.D. 114; 1 T.L.R. 502.
[18] [1955] 2 Q.B. 195; [1955] 2 W.L.R. 904; [1955] 2 All E.R. 173.

1959

HOBBS
v.
HOBBS AND COUSENS.

Stevenson J.

the co-respondent should ask to be allowed to inspect the contents of the brief for which he is going to be required to pay something by way of party and party costs. The co-respondent argues that he must see and become familiar with the contents of that document in order to qualify himself to present his contention that the fees which he is required to pay are excessive, and, in the ordinary course of events, a litigant is entitled to see and learn all he can about the matters in possession of the other side which are relevant to the issue between them. But there is no doubt that legal professional privilege, which has a sure and unshakable foundation in our law, protects from disclosure not only documents which embody communications between a client and his legal adviser which come into existence in the course of litigation, or in anticipation of litigation, but even documents which without contemplation of any litigation at all come into existence in order to enable the client to obtain the legal advice which he requires.

As this case has been argued by a litigant in person it is perhaps desirable that I should say that that privilege has a sound basis in common sense. It exists for the purpose of ensuring that there shall be complete and unqualified confidence in the mind of a client when he goes to his solicitor, or when he goes to his counsel, that that which he there divulges will never be disclosed to anybody else. It is only if the client feels safe in making a clean breast of his troubles to his advisers that litigation and the business of the law can be carried on satisfactorily.

That is the principle with which the co-respondent in the present case finds himself faced when he says that he ought, as a matter of justice and common sense, to be allowed to inspect and closely examine the contents of the brief which has been delivered to counsel on behalf of his adversary. I am satisfied that he is not entitled to inspect that brief or its contents; and I so determine the question that has been submitted to me on this reference.

It has been pointed out to the co-respondent, and rightly pointed out, that the fact that the taxing registrar and nobody else is permitted to see that document does not in the least prevent him, the co-respondent, from contending that the sums which he is invited to pay by way of costs are excessive having regard to the brief and its contents; and it is, of course, the

duty of the taxing registrar closely to scrutinise the contents of this or any other brief to see that it is not overloaded with surplus matter which exceeds what is reasonably necessary for the presentation of the petitioner's case. The co-respondent can, and I doubt not will, make that request; and I have no doubt that that duty, which rests upon the taxing registrar, will be faithfully performed.

The co-respondent has also made the point that this litigation is now concluded and the decree made absolute; and he therefore submits that no harm will be done now by permitting him to see this document. There is, however, an abundance of authority in support of the proposition that once legal professional privilege attaches to a document, of which a brief to counsel such as this is only one example, that privilege attaches for all time and in all circumstances. A number of cases which demonstrate that proposition have been cited, in particular the judgment of Cockburn C.J. in *Bullock* v. *Corry*,[1] and also the judgment of Brett M.R. in *Pearce* v. *Foster*,[2] the particular passage in point being at p. 119 of the report.

Even if that were not plain, as I am satisfied it is, it is, of course, a feature of litigation in this Division that even after the litigation has achieved the degree of finality marked by a decree absolute dissolving a marriage, more often than not a number of questions remain to be decided relating to the custody of the children and to maintenance in which the conduct of the parties may have a significance. Even if there were any doubt as to the view which I have expressed about the area covered by legal professional privilege, it is quite plain that in litigation in this Division it would have the most intolerable consequences if someone in the position of the present co-respondent were permitted to see the inside of the brief which was delivered on behalf of the petitioner.

I have been greatly assisted by a most careful argument on behalf of the Queen's Proctor conducted by Mr. Comyn, and by an admirable argument from Mr. Wilmers on behalf of the petitioner, in which they have been good enough exhaustively to analyse a number of authorities which deal with this matter; but I do not think that it is necessary for the purpose of determining

[1] (1878) 3 Q.B.D. 356.

[2] (1885) 15 Q.B.D. 114; 1 T.L.R. 502.

1959

HOBBS v. HOBBS AND COUSENS.

this question to burden my judgment with a long analysis of those authorities, because I am quite satisfied that the answer to the question "Can the co-respondent see this brief?" is: "No, he "cannot."

Order accordingly.

Solicitors: *Jaques & Co.; The Treasury Solicitor.*

J. B. G.

1959
Dec. 10.

Sachs J.

HULL *v.* HULL.

Estoppel—Per rem judicatam—Husband and wife—Custody—Whether spouse estopped in custody proceedings from making allegations which could have been made at hearing of suit for divorce.

A husband, whose wife had been granted in an undefended suit a decree nisi of divorce on the ground of his desertion, sought in custody proceedings to allege that, contrary to the finding of the judge who heard the suit, so far from having deserted the wife, she had deserted him and, further, that she had committed adultery other than that disclosed in her discretion statement:—

Held, (1) that as the court which heard the suit had made an express finding that the husband had deserted the wife, and had based the decree nisi on that finding, the doctrine of res judicata applied to estop the husband in the custody proceedings from denying that he had deserted the wife, and from alleging that she had deserted him.

Corbett v. *Corbett* [1953] P. 205; [1953] 2 W.L.R. 1124; [1953] 2 All E.R. 69, C.A. distinguished.

(2) That the evidence relating to adultery was not to be excluded, because no facts establishing that offence had been raised or pronounced on at the trial, and because the matter in issue in the custody application, namely, which party was the better suited to have custody of the child, having regard to that child's welfare, was different from the issue at the trial, and the evidence relating to adultery might be relevant to prove that one spouse was less suitable than the other to have custody of the child, and it was not on any other ground against public policy to admit that evidence.

Duchesne v. *Duchesne* [1951] P. 101; 66 T.L.R. (Pt. 2) 639; [1950] 2 All E.R. 784 distinguished.

SUMMONS adjourned into open court.

On June 30, 1959, a wife was granted a decree nisi of dissolution of marriage on the ground of the husband's desertion, the

---

[Reported by D. R. ELLISON, Esq., Barrister-at-Law.]

court's discretion being exercised in the wife's favour in respect of her adultery. The suit was undefended, the husband's answer having been struck out on his own application, but he was represented by counsel at the hearing on custody of the children and costs. On September 3, 1959, the husband issued a summons for custody of the children and, in support of that summons, on September 16, 1959, he swore an affidavit alleging that, contrary to the finding of the judge who heard the suit, he had not deserted the wife, but that, in fact, she had deserted him and, further, that she had committed adultery beyond that disclosed in her discretion statement. The wife thereupon took out a summons applying that the paragraphs in the husband's affidavit alleging desertion and undisclosed adultery by her be ordered to be deleted from his affidavit. The registrar refused so to order. On October 20 the wife, by summons, appealed against the registrar's decision. Sachs J. reserved his judgment into open court.

John Syms for the wife.
D. J. Turner-Samuels for the husband.

The following cases, in addition to those referred to in the judgment, were cited in argument in chambers: *Bater* v. *Bater (otherwise Lowe)* [1]; *Harriman* v. *Harriman* [2]; *Hoystead* v. *Taxation Commissioner* [3]; *Cooper* v. *Cooper (No. 2)* [4]; *Bernard* v. *Bernard (Sutton cited)* [5]; *Fisher* v. *Fisher*.[6]

Cur. adv. vult.

1959. Dec. 10. SACHS J. read the following judgment: This appeal raises in acute form constantly recurring and much disputed questions as to estoppels in custody proceedings initiated under the Matrimonial Causes Acts. These questions are of wide importance, not least because of the anxieties involved in any point which concerns the welfare of children.

In practice, the relevant facts as to which dispute arises normally fall into one of four categories:

(1) Facts which are the subject of express or implicit findings by the trial judge upon evidence laid before him, which result in the conclusion that a matrimonial offence has, or has not, been

[1] [1906] P. 209; 22 T.L.R. 408, C.A.
[2] [1909] P. 123; 25 T.L.R. 291, C.A.
[3] [1926] A.C. 155; 42 T.L.R. 207, P.C.
[4] [1955] P. 168; [1954] 3 W.L.R. 923; [1954] 3 All E.R. 358, D.C.
[5] [1958] 1 W.L.R. 1275; [1958] 3 All E.R. 475.
[6] [1959] 3 W.L.R. 471; [1959] 3 All E.R. 131, C.A.

1959

HULL
v.
HULL.

Sachs J.

committed, or that a recriminatory plea has, or has not, been established, and which then form the foundation upon which a decree is granted or a prayer for a decree rejected.

(2) Facts which are the subject of express findings by the trial judge, but which have not been used for the above foundation.

(3) Facts as to which no evidence has been adduced at trial but which, if established, could have formed the basis for the grant of a cross-prayer or for a recriminatory plea affecting the discretion of the court.

(4) Facts which, if established, would not have provided a basis for relief or a recriminatory plea of the type referred to in category (3), but which might have come somewhat close to so doing, and which were either not the subject of evidence adduced before the trial judge or were not the subject of findings by him.

The first category covers not merely a finding that a matrimonial offence—for example, cruelty—has been committed, but also any specific findings as to conduct which was held to be cruel, such as any blows held to have been struck. Facts in this category fall within that strict definition by which res judicata is stated to relate to a fact "directly in issue in the case" which has "actually been decided by the court and appears from the "judgment itself to be the ground on which it was based": *per* Lush J. in *Ord* v. *Ord*,[1] citing Sir James Stephen's Digest of the Law of Evidence, 10th ed., p. 53.

The second category, to quote an example from the run of the chambers work in this court, would include a finding that a respondent wife chastised a child with undue harshness, but that this did not affect the petitioner's health and that, for this sole reason, did not constitute part of the cruelty for which a decree was granted. An allegation of promiscuously lascivious conduct short of adultery could fall into the fourth category, as would the almost limitless allegations that could fall within the ambit of matters proper to be considered in relation to the exercise of the court's discretion as discussed in *Blunt* v. *Blunt*.[2]

The present case is a relatively simple one of a not unusual type. On June 30, 1959, the wife obtained a decree nisi of divorce on the grounds of her husband's desertion commencing in 1950. The suit came into the undefended list after the husband's answer had on May 1, 1959, been struck out at his own request. When the facts upon which the charge of desertion was

[1] [1923] 2 K.B. 432, 440; 39 T.L.R. 437, D.C.

[2] [1943] A.C. 517; 59 T.L.R. 315; [1943] 2 All E.R. 76, H.L.

based were proved in court, the husband was represented by counsel in relation to costs and custody.

The three children of the marriage have been with the husband and his mother since 1950. Between that year and the end of 1956, the wife only saw them on about five occasions, for reasons which she attributes to the husband. Since 1956, she has not seen them at all. In those circumstances the husband, on September 3, 1959, issued an application that he be granted the custody of the children. In support of that application he seeks to put in evidence facts showing that, contrary to the finding of the trial judge, he was never in desertion and that the relevant separation was really due to the wife's desertion, and further, that the wife, before the date of the decree nisi, committed adultery with men other than the man she has now married—the last of such allegations being one which concerned 1957. As regards each of his allegations the husband relies on matters within his own knowledge at the date of the decree nisi.

The wife claims that the husband is estopped from alleging either her desertion or her adultery with the other men.

The facts set up by the husband as regards the desertion thus fall into the first of the above four categories. The way he seeks in custody proceedings to go behind the decree is typical of attempts to which one becomes accustomed in chambers, on applications stemming alike from decrees granted in defended and in undefended causes.

The facts set up by the husband as to his wife's adultery fall into the third category and are typical of the allegations made by a spouse who has allowed a decree to be obtained against him in an undefended suit.

I am thus here solely concerned with the law relating to the first and third categories, in an instance where the facts sought to be set up were at the date of the hearing within the knowledge of the party now alleging them.

On the question of estoppel in custody proceedings under the Matrimonial Causes Acts, the industry of counsel has only brought to light one reported case, and in view of the arguments raised with regard to its effect it seems best first to consider what conclusion I would reach in the light of other authorities dealing with res judicata and estoppel.

At the outset it is to be noted that the jurisdiction of this Division to deal with the custody of children is the creature of statute, and that under the above Acts it only arises when a lis

1959

HULL
v.
HULL.

Sachs J.

between a husband and wife commences. The custody application is made in the suit—here divorce proceedings—and whether or not a final decree has resulted, the title of the proceedings remains unaltered, save, of course, in so far as the parties may change their names. Here the application was made before decree absolute and has continued after it. In law I cannot here see any distinction between the position before, and after, the final decree; the application is made in the same suit as that in which the decree is granted, and is for what is usually termed ancillary relief.

To the extent that the application, whether made in the prayer of the petition or by later summons, is, albeit in one sense a separate proceeding, yet made in the same suit, the position is different from that of almost all other cases in which estoppels have been considered, and in which the courts have considered, in a second set of proceedings, the effect of what happened in an earlier set of proceedings. It may thus well be that as between the trial of the matrimonial cause and the ancillary custody application an analogy to the trial of separate issues in an action or cause is closer than the analogy to trials of two successive causes.

I will now turn to the position, in a custody application, of facts that are in the third category—here the adultery allegations. Whether one looks on the custody application as if it were a second cause successive to the trial at which the decree nisi was granted, or whether one looks on it as being a further proceeding in the same suit as that trial, it seems to me completely clear that the matter in issue in the custody application is different from that at the trial. At trial, the issue is whether the grounds for relief, or a bar to relief, have been established. On the application for custody, the issue is which party is the better suited to have custody of the child, having regard to that child's welfare.

In establishing that a spouse is less suitable to have the custody of a child, it may prove relevant to put in evidence facts which may also establish that the spouse has committed a matrimonial offence. If the facts which establish that offence were not raised and pronounced upon at trial, I know of no principle of estoppel as applicable to successive suits or actions which can prevent those facts being put in evidence on the matter in issue in the custody application. A fortiori can they thus be put in evidence if the truer analogy is to the trial of separate issues in the same set of proceedings.

I pause only to note that Mr. Syms, in arguing the contrary view, was constrained to assert that even if the husband's case

was that for a period immediately before the decree nisi the wife had been living the life of a common prostitute, the husband's affidavits could not mention that fact, despite his being obviously able to refer to facts in the fourth category, e.g., lascivious and promiscuous conduct short of adultery.

Once it is clear that the law of estoppel cannot for the above reason apply to these third-category facts, the relevant evidence of adultery can only be excluded if it can be shown that there should be applied to custody proceedings those passages relating to maintenance proceedings which state that, even where there is no estoppel, a spouse is "for reasons of public policy pro-" hibited from asserting" matters known at the date of trial which, if then raised, might well have provided an effective answer to the petition or resulted in cross-decrees: see *Duchesne* v. *Duchesne*.[3] To my mind, however, there arises in custody proceedings an additional factor touching public policy—the welfare of the children. That factor is of such importance that plainly the court, whatever be the position as regards maintenance proceedings, should not in custody proceedings exclude on grounds of public policy evidence which would not be excluded under the established rules relating to estoppel.

I would add that in *Duchesne* v. *Duchesne*[3] Pearce J. dealt with no third-category facts and only excluded those in the first category; that the facts excluded in *Lindsay* v. *Lindsay*,[4] which he cited on the public policy point, were also, as appears from the judgment of Lord Merriman P.,[5] first-category facts; and that, accordingly, *Robinson* v. *Robinson*,[6] the only other case so cited, seems to be left as the sole direct authority for the application of this new and controversial facet of public policy to evidence of third-category facts, and that case concerned a maintenance application.

In my view, the attempt in the present case to exclude the evidence as to adultery accordingly fails, because the doctrine of estoppel does not apply, and because it is not on any other ground against public policy to admit that evidence.

That disposes of so much of this appeal as relates to the allegations of adultery. There remain for consideration those passages in the husband's affidavit which seek to show that he never was in desertion, and which fall into what I have called the first category. Here much more difficult questions arise.

[3] [1951] P. 101, 113; 66 T.L.R. (Pt. 2) 639; [1950] 2 All E.R. 784.
[4] [1934] P. 162; 50 T.L.R. 441.
[5] [1934] P. 162, 168, 443.
[6] [1943] P. 43; 59 T.L.R. 170; [1943] 1 All E.R. 251.

1959

HULL v. HULL.

Sachs J.

This much, however, is plain. If the correct analogy is that of successive proceedings, then unless the custody application falls into some exceptional class of the type I will later discuss, the doctrine of res judicata applies. Similarly, unless the application falls into some such exceptional class, no one would be disposed to argue that the doctrine of res judicata does not preclude the same court, in one set of proceedings, from being asked, in effect, to reverse in a later phase of those proceedings a finding of fact reached in an earlier phase.

The point propounded with persuasive force by Mr. Turner-Samuels is that the same sort of exception applies to an application under section 26 (1) of the Matrimonial Causes Act, 1950, as applies to issues affecting status tried by this court under section 4 of that Act. As regards section 4, the exception stems from the phrases in it commencing: "On a petition for divorce it shall be "the duty of the court to inquire, so far as it reasonably can, into "the facts alleged" and in certain possible bars to relief. Its effect was discussed by the Court of Appeal in *Thompson* v. *Thompson*.[7] My attention was particularly directed to those parts of the judgment of Denning L.J. which, at p. 29, first explain how "estoppels bind the parties but not the court," and then, at pp. 31 to 33, deal with the manner in which the court can either exercise its discretion to enforce the estoppel or allow the parties a relitigation of the relevant facts.

Such an exception to the long-established rule of res judicata must either derive from statute or exist by reason of some inherent power or duty of the court. Of statutory provisions in relation to custody proceedings the one and only section which Mr. Turner-Samuels pressed on me was section 1 of the Guardianship of Infants Act, 1925. This provides: "Where in any "proceeding before any court . . . the custody . . . of an "infant, . . . is in question, the court, in deciding that question, "shall regard the welfare of the infant as the first and paramount "consideration, and shall not take into consideration whether "from any other point of view the claim of the father, . . . in "respect of such custody, . . . is superior to that of the mother, "or the claim of the mother is superior to that of the father." That section, however, does not contain words such as those above cited as being part of section 4 of the Matrimonial Causes Act, 1950. To my mind, it deals simply with the weight to be attached to facts once they are proved, and not with the question

[7] [1957] P. 19; [1957] 2 W.L.R. 138; [1957] 1 All E.R. 161, C.A.

of what evidence is admissible to prove them. The word "regard" is thus used in much the same sense as it is in the phrase "having regard to" in section 19 (2) of the last cited Act. Moreover, the provisions of section 1 of the Act of 1925 apply to all courts and, if construed in accordance with Mr. Turner-Samuel's submission, empower each court to disregard the previous findings of fact not only of its own but of every other court and, for instance, enable magistrates and county court judges to decide de novo whether decisions of fact made in this Division (whether or not confirmed on appeal) are, in their view, right or wrong. It is a bold submission. I doubt if it has previously been made during the 34 years since the passing of the Act of 1925, and I do not feel able to accept it. Had the legislature intended so far-reaching a result it would surely have used phraseology quite different and, perhaps, more akin to that used in section 4, or, alternatively, section 7 of the Matrimonial Causes Act, 1950.

If there is some other statutory provision which here frees this court from the rule of res judicata, it has not been cited. I pause to note that the Matrimonial Proceedings (Children) Act, 1958, does not apply to the proceedings now before me and has not been considered.

Next arises the question whether a court of this Division can, by virtue of its inherent jurisdiction in relation to children, exercise its discretion to go behind what would normally be res judicata. If it were exercising that delegated power of the Crown as parens patriae which is the origin of the relevant Chancery proceedings relating to infants, the argument might be attractive, but the consistent trend of a whole series of decisions, the two latest being that of Upjohn J. in *In re Andrews*,[8] and that of Winn J. in *Winstone* v. *Winstone*,[9] precludes my taking the view that when exercising statutory jurisdiction under the Matrimonial Causes Act, 1950, this court is in precisely the same position as if it were exercising inherent jurisdiction. The judgment of Lord Goddard C.J. in *In re A. B. (an Infant)*[10] further illustrates from a different angle how careful a court must be before acceding to an argument that it can exercise inherent powers as parens patriae when dealing, in relation to infants, with questions that arise under statutes.

[8] [1958] Ch. 665; [1958] 2 W.L.R. 946; [1958] 2 All E.R. 308.

[9] [1959] 3 W.L.R. 660; [1959] 3 All E.R. 580.

[10] [1954] 2 Q.B. 385; [1954] 3 W.L.R. 1; [1954] 2 All E.R. 287, D.C.

1959

HULL
v.
HULL.

Sachs J.

Moreover, the rules as to res judicata in its strict sense and estoppel, in so far as it derives from or includes that of res judicata, are usually said to be rules of evidence. It is relevant to mention that, save only in regard to welfare officers' reports, this court is, in custody proceedings, bound by the usual rules of admissibility: see *Rossage* v. *Rossage* [11] as to hearsay.

It follows that I find myself unable, on general principles, to find a ground on which, in this custody application, the doctrine of res judicata does not apply to facts falling in the first category, even if that application is regarded as a successive proceeding rather than a part of one set of proceedings. There remains the question of whether authority enables me to say that it does not so apply.

Mr. Turner-Samuels naturally pressed *Corbett* v. *Corbett* [12] on me as being such an authority. Mr. Syms' first answer was that the relevant parts of the judgment were obiter, but, of course, even if that were so, I would wish to follow them if I could. More weighty was the problem he posed as to what precisely were the facts to which the relevant passages in the judgment relate and the circumstances in which they were spoken.

In that case, the respondent wife had, on her cross-prayer, secured a decree nisi on account of her husband's cruelty, the court exercising its discretion in her favour in relation to adultery with the co-respondent disclosed in the discretion statement, and held to have been conduced to by the husband's cruelty. The husband then appealed and on appeal moved for leave to call fresh evidence. The fresh evidence was directed to proving, first, that the wife had committed adultery with men other than the co-respondent (one of the affidavits being that of a man who swore he had spent the night with her) and, secondly, that although the adultery with the co-respondent was properly disclosed in the discretion statement, the wife's association with him had been longer than therein stated and had its monetary aspect. The object of trying to introduce this fresh evidence was largely to enable the court to say that the trial judge had come to a wrong conclusion on questions of credibility. But from the point of view of a judge dealing with a custody issue, if the motion failed, as it did, the only evidence that could have been expected to affect his mind on that issue, viz., that relating to the adultery with other men, quite clearly fell into the third category. So, probably, did the evidence concerning the wife's association with the co-respondent.

[11] [1960] 1 W.L.R. 249; [1960] 1 All E.R. 600, C.A.

[12] [1953] P. 205; [1953] 2 W.L.R. 1124; [1953] 2 All E.R. 69, C.A.

In that state of affairs, counsel for the husband put forward an ab inconveniente argument that rejection of the motion would affect the custody issue by permitting an estoppel to arise. His argument did not apparently reach the stage when authorities were cited; counsel for the wife does not appear to have been called on to deal with it; it received no mention at all in the leading judgment of Sir Raymond Evershed M.R.; and nothing relating to it formed part of the ratio decidendi of that judgment, with which both the other members of the court expressly agreed.

Birkett L.J., however, said [13]: "The question of the custody "of the child will, of course, be in the complete discretion either "of the registrar or of the judge, and he will decide what evidence "he will hear and what he thinks relevant to the particular issue "which he then has to determine"—a passage which, contrary to my first impression, does not on reflection seem to me intended to preclude the judge from making decisions on admissibility as well as on relevance. Romer L.J., after some observations to which I will later refer, said in conclusion [14]: "All I am saying is that, "for my part, I take the view that it should not be regarded as "matter to be excluded from his consideration altogether, merely "on the ground that it did not form part of the evidence in the "divorce proceedings."

It thus appears that Mr. Syms was right in submitting that the references to the estoppel argument were obiter. Indeed, they partake rather of the nature of guidance from an appellate court to a first instance tribunal relating to the special facts of the case under appeal, but even so, not intended to be a binding direction. In any event, Romer L.J.'s views related to third-category facts; he had not been asked to address his mind to first-category facts and he obviously had not had the benefit of such full and careful arguments on this point as have been before me.

Earlier, however, he had said [15]: "Some at least of the "evidence contained in these affidavits would, if true, be of "relevance in the custody proceedings, and, in my opinion it "should not be excluded merely because it did not form part of "the material on which the issues of divorce were determined," and he said that to exclude such evidence "would result in "preventing the court from discharging its paramount duty in "matters relating to the care and custody of the children, namely,

[13] [1953] P. 205, 218. C.A.
[14] Ibid. 219.
[15] [1953] P. 205.

1959

HULL v. HULL.

Sachs J.

"to ascertain what directions will best serve the interests of "the children themselves." It was this passage which Mr. Turner-Samuels most relied upon.

It is not unlikely that in using those phrases Romer L.J. may have had in mind in reference to third-category facts that part of the then relatively recently reported judgment in *Duchesne* v. *Duchesne* [16] which touched on public policy and which I have already considered. In that event, he would by those phrases simply have been negativing its application to custody cases in the same way as I have mentioned. But it would anyway seem to me what Jenkins L.J.[17] has spoken of as an "abuse of authori- "ties" to apply those phrases to first-category facts and thus to a case "in which the facts and circumstances are entirely different "and which raise questions to which their authors were not direct- "ing their minds at all." Accordingly, I do not accept the submission that *Corbett* v. *Corbett* [18] provides even obiter guidance on the way in which the court should here deal with such of the husband's allegations as fall into the first category.

It follows that it is for me to affirm so much of the learned registrar's order as concerns third-category facts and hold them to be admissible, and to vary his order in so far as he refused to cause to be expunged allegations of first-category facts from the affidavit of the husband.

In case, however, this appeal goes further, I must naturally consider what would be the course that should here be taken on the footing that the court has as regards first-category facts a discretion of the type discussed by Denning L.J. in *Thompson* v. *Thompson*.[19]

It seems to me that where an estoppel exists which binds the parties unless the court says otherwise, the wife is normally entitled before answering her husband's affidavit to know whether those statements in it which are prima facie inadmissible are going to be considered by the court. In the present case that question would conveniently be raised by the application under appeal and would properly be dealt with here and now.

A procedure by which a court is in the course of a single set of proceedings asked, in effect, to stand on its head and come to a diametrically opposite finding of fact to that found and acted upon

[16] [1951] P. 101; [1950] 2 All E.R. 784.

[17] In *Martell* v. *Consett Iron Co. Ltd.* [1955] Ch. 363, 414; [1955] 2 W.L.R. 463; [1955] 1 All E.R. 481.

[18] [1953] P. 205.

[19] [1957] P. 19.

by it earlier therein involves an exercise which is, to my mind, somewhat unattractive. It might also quite easily result in the ridiculous situation that on the same day and in the same cause it would act on opposite conclusions of fact in a custody and in a maintenance application.

The court's discretion in favour of such a course would, to my mind, only be exercised in truly exceptional cases of quite a different nature from the present one. Moreover, where, as here, the children have been in the care of the husband for eight or nine years, the question of "whose was the desertion" is one which Mr. Turner-Samuels very properly conceded to be "of a "weight that would be marginal or negligible," and, in my view, it cannot in practice influence the result of this custody application at all. Evidence which is solely directed to the question who, in 1949 or 1950, was in desertion is either irrelevant or of such nominal importance as to raise a time-wasting issue. On the footing that I had a discretion whether or not to admit the evidence I would refuse to admit it.

It only remains to mention that both counsel asked me to draw different and, indeed, opposite inferences from the existence and wording of rules 54 and 56 of the Matrimonial Causes Rules, 1957, which concern interventions, separate representation, and directions for the initiation of wardship proceedings. Suffice it to say that in the present suit no one has intervened and no reason exists why the court should cause those rules to be brought into operation. Here I am dealing with a simple application as between two parties in which one of them has made a commonplace—one might almost say common-form—attempt to go behind findings of first-category facts. Until some case arises in which the provisions of those rules are utilised, the question does not arise as to whether they may not provide a safety valve preventing this court in a truly exceptional case from being subjected to undue pressure by the rule as to res judicata.

The result is that I order the parts of the husband's amended affidavit of October 27, 1959, agreed by Mr. Turner-Samuels to be solely directed to the question of desertion, to be deleted. That affidavit (which, like its predecessor, was not drafted by Mr. Turner-Samuels) cannot be filed as it stands, and should be re-sworn and filed after the appropriate adjustments have been made.

In conclusion, I repeat my indebtedness to both counsel for their full and helpful arguments, coupled with their references to

1959

HULL v. HULL.

a number of authorities, starting with *Finney* v. *Finney*[20] and *Conradi* v. *Conradi, Worrall and Way*,[21] in addition to those I have cited.

Solicitors: *Wainwright & Co.; Robert K. George.*

[20] (1868) L.R. 1 P. & M. 483. [21] Ibid. 514.

1959
July 15, 27, 28; *Oct.* 2.

Collingwood J.

HILL (orse. PETCHEY) *v.* HILL.

Husband and Wife — Nullity — Jurisdiction — Marriage celebrated in jurisdiction — Voidable marriage — Incapacity — Husband resident and domiciled in Scotland — Wife resident in England — Matrimonial Causes Act, 1857 (20 *&* 21 *Vict. c.* 85), *s.* 22 — *Supreme Court of Judicature (Consolidation) Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 32.

A wife presented a petition praying for a declaration that her marriage be declared null and void on the ground of the husband's incapacity to consummate it. At the date of the proceedings the husband was resident and domiciled in Scotland and the wife was resident in England. The marriage was celebrated in England. At the hearing of the petition, which was undefended, the court was satisfied as to the husband's incapacity but adjourned the matter for argument by the Queen's Proctor on the question of jurisdiction:—

Held, that it was well established that the celebration of a marriage in England gave the courts jurisdiction in nullity suits in which the marriage was void, such jurisdiction being derived from the practice of the ecclesiastical courts which knew no distinction between void and voidable marriages so far as jurisdiction was concerned; whether or not the courts had jurisdiction on the basis of the celebration of the marriage in England where the ground alleged was wilful refusal to consummate the marriage, there was nothing to preclude the assumption of jurisdiction on that basis where the ground was the fundamentally different one of incapacity; and the wife was entitled to a decree.

Ramsay-Fairfax v. *Ramsay-Fairfax* [1956] P. 115; [1956] 3 W.L.R. 849; [1955] 3 All E.R. 695 applied.

Casey v. *Casey* [1949] P. 420; 65 T.L.R. 528 distinguished.

Addison v. *Addison* [1955] N.I. 1 considered.

Petition for nullity on the ground of incapacity.

A ceremony of marriage was performed on July 15, 1950, at the Parish Church in Hornsey, Middlesex, and, thereafter, the

1959

HILL (ORSE. PETCHEY) v. HILL.

parties lived together in England. The husband, who was Scottish, was employed in England at the time of the marriage ceremony.

The parties separated on September 7, 1951, when the husband left the matrimonial home as the result of an order of that date made by the Highgate justices, by which the court adjudged that the husband had treated the wife with persistent cruelty and ordered that the wife should no longer be bound to cohabit with him. The court also ordered the husband to pay maintenance, and payments were made pursuant to that order until June, 1957. Despite the existence of the non-cohabitation clause, the wife allowed the husband to stay with her in the matrimonial home on some four occasions during his week-end leaves from the Royal Air Force. Attempts at intercourse were made during those visits but they were abortive and the marriage was never consummated. The last visit was at Whitsun, 1955, and thereafter the husband returned to live in Scotland. In January, 1956, the wife had an interview with an officer of the Royal Air Force and discussed her matrimonial affairs with him and in February, 1958, she filed a petition seeking a declaration that the marriage be declared null and void on the ground of the husband's incapacity to consummate it and alleging that the husband was domiciled in Scotland.

After hearing the evidence Collingwood J. adjourned the matter for argument by the Queen's Proctor.

James Stirling Q.C. and *A. B. Hollis* for the wife.
Colin Duncan for the Queen's Proctor.

In this suit the arguments of counsel for the wife petitioner and of counsel for the Queen's Proctor were based on the same propositions and referred to the same authorities. Their submissions, which were accepted by the court, were substantially as set out in the judgment.

Cur. adv. vult.

October 2. COLLINGWOOD J. referred to the facts and, holding that the husband was, at the date of the ceremony of marriage and thereafter incapable of consummating it and that it was not until the interview of January, 1956, that the wife had knowledge of the law and the facts as to nullity and that she had not, therefore, approbated the marriage, continued: The husband is resident and domiciled in Scotland. The wife is resident in

1959

HILL (orse. PETCHEY) v. HILL.

Collingwood J.

England, and the sole ground upon which it is submitted that this court has jurisdiction to hear and determine the petition is that the ceremony of marriage took place in England.

The problem is a difficult one; it is not covered by direct authority and it is the subject of a divergence of opinion in the textbooks. It is accepted by counsel for the wife that the fact that the wife alone is resident in England is not sufficient to found jurisdiction in this court, but it is submitted on her behalf —and counsel for the Queen's Proctor supported that submission— that the law on this question is correctly stated in Rayden on Divorce, 7th ed., at p. 51, which reads: "The court has jurisdic- "tion to entertain a suit for nullity where the marriage was "celebrated in England, where the marriage is void ipso jure "and where it is voidable also, for the court does not draw a "distinction, for jurisdictional purposes, between void and void- "able marriages."

It is necessary to go back to the Matrimonial Causes Act, 1857, by section 6 of which Act the jurisdiction then vested in or exercisable by any ecclesiastical court over matrimonial causes —including suits of nullity—was transferred to a new "Court of "Record, to be called 'The Court for Divorce and Matrimonial "'Causes.'" By section 22 of this same Act it was provided that "In all suits and proceedings, *other than* proceedings to "*dissolve* any marriage, the said court shall proceed and act and "give relief on principles and rules which in the opinion of the "said court shall be as nearly as may be conformable to the "principles and rules on which the ecclesiastical courts have "heretofore acted and given relief. . . ." This section was repealed by the Supreme Court of Judicature (Consolidation) Act, 1925, but was, in effect, re-enacted by section 32 of that Act which provides that: ". . . where no special provision is "contained in this Act or in rules of court with reference thereto, "any such jurisdiction shall be exercised as nearly as may be in "the same manner as that in which it might have been exercised "by the court to which it formerly appertained."

As was held by Pilcher J. in *Hutter* v. *Hutter*[1]: "In sub- "stance, therefore, it is still the duty of this court in all matri- "monial suits, including suits for nullity, but excluding suits "for dissolution, to proceed and act and give relief on principles "and rules which shall conform as closely as possible to the "principles and rules acted upon by the ecclesiastical courts."

[1] [1944] P. 95, 99; 60 T.L.R. 541; [1944] 2 All E.R. 368.

1959

HILL (ORSE. FETCHEY) v. HILL.

Collingwood J.

In 1860, shortly after the Matrimonial Causes Act, 1857, came into force, the case of *Simonin* v. *Mallac* [2] was heard before the full court consisting of the Judge Ordinary (Sir Cresswell Cresswell), Channell B. and Keating J. In that case, two French subjects, then domiciled in that country, came over to England and were married by licence according to the law of England, but without the observance of certain formalities and consents required by the law of France in respect of the marriage of its own subjects, irrespective of the place where celebrated. They then returned to France, where the man refused to celebrate the marriage according to French law, nor was the marriage consummated. The woman instituted a suit for nullity in the French courts, and obtained a decree. She subsequently came to reside in England and petitioned for a decree of nullity here. The first question considered was whether the court had any jurisdiction, and this is the only part of the judgment which is material in this connection.

The court held that it had jurisdiction, based on the lex loci contractus. The Judge Ordinary, in the course of his judgment, said [3]: "This question therefore depends upon the first proposi- "tion, that the parties by professing to enter into a contract in "England mutually gave to each other the right to have the "force and effect of that contract determined by an English "tribunal. . . . There is nothing contrary to natural justice in "calling upon him [the respondent] to have the validity or "invalidity of a supposed contract ascertained and determined "by the tribunal of the country where it was entered into by "him: for according to Lord Stowell in *Dalrymple* v. *Dalrymple* [4] "it is an indisputable rule of law, as exercised in all civilised "countries, that a man who contracts in a country engages for a "competent knowledge of the law of contracts in that country. "If he rashly presumes to contract without such knowledge he "must take the inconveniences resulting from such ignorance "upon himself, and not attempt to throw them on the other "party." It is to be observed that in coming to the conclusion that the court had jurisdiction to hear the suit, the Judge Ordinary made no suggestion that there was any distinction for this purpose between void and voidable marriages.

In *Sottomayor* v. *De Barros* [5] two Portuguese subjects, domiciled in Portugal, went through a marriage ceremony in

[2] (1860) 2 Sw. & Tr. 67.
[3] Ibid. 75.
[4] (1811) 2 Hag.Con. 54, 61.
[5] (1877) 2 P.D. 81.

1959

HILL (orse. PETCHEY) v. HILL.

Collingwood J.

England where they were then residing. They were first cousins and by the law of Portugal such a marriage between Portuguese subjects was prohibited. They subsequently returned to Portugal where they continued to reside. Phillimore J. held [6] that the court was not bound to recognise the incapacities affixed by the law of the domicile of the parties, and refused to grant a decree of nullity to the petitioner.

The Court of Appeal reversed this decision,[7] but the importance of the case for the present purpose is that, neither in the court of first instance nor in the Court of Appeal, before James, Baggally and Cotton L.JJ., was the jurisdiction of the court questioned—nor was it suggested that the decision on the point of jurisdiction in *Simonin* v. *Mallac* [8] was wrong. The Queen's Proctor was represented at both hearings, and the case was subsequently reheard before Sir James Hannen P., when again jurisdiction was assumed.[9]

In *Cooper* v. *Crane* [10] the wife petitioner asked for a decree on the ground of coercion. The respondent was resident in the United States of America, and apparently domiciled in one of the states thereof. It was not suggested that he was domiciled in England, and the only ground for jurisdiction which appears is the fact that the marriage was celebrated here. *Linke* v. *Van Aerde* [11] was a petition upon the ground of bigamy. The parties were foreigners, and were assumed to be of foreign domicile. Gorell Barnes J. said [11]: "The marriage contract was entered "into here, and on that ground this court was asked to deal with "it." He then referred to the cases of *Simonin* v. *Mallac* [12] and *Sottomayor* v. *De Barros*,[13] and decided that he had jurisdiction to hear the case. Again it is to be observed that Gorell Barnes J., so far as the report shows, attached no significance to the fact that the claim was that the marriage was void, as affecting his jurisdiction.

This distinction, for the purposes of jurisdiction, between void and voidable marriages, appears for the first time in *Inverclyde* v. *Inverclyde*.[14] This was a wife's petition upon the ground of the respondent's impotence. The petitioner alleged that the parties were domiciled in Scotland, that she was resident in England, where the marriage ceremony had taken place, and

[6] 2 P.D. 81, 86–89.
[7] (1877) 3 P.D. 1.
[8] 2 Sw. & Tr. 67.
[9] (1879) 5 P.D. 94.
[10] [1891] P. 369.
[11] (1894) 10 T.L.R. 426.
[12] 2 Sw. & Tr. 67.
[13] 3 P.D. 1.
[14] [1931] P. 29; 47 T.L.R. 140.

1959

HILL (ORSE. PETCHEY) v. HILL.

Collingwood J.

that the respondent was resident both in England and in Scotland. The respondent entered an appearance under protest on the ground that the court had no jurisdiction.

Bateson J. held that a decree in a nullity suit on the grounds of impotence, being a decree affecting status of the parties, was a judgment in rem just as a decree in a divorce suit is a judgment in rem; therefore, the only court competent to pronounce it was the court of the domicile. He said [15]: "The marriage being "voidable and not void and the decree affecting and involving "an alteration in status and being a judgment in rem binding on "all the world, there can be no jurisdiction in this court unless "the parties are domiciled in this country. It seems to me "that if the principle is sound that [if] a suit for dissolution of "marriage in divorce jurisdiction depends on domicile it must "equally so depend in a suit for dissolution of marriage on the "ground of impotence. To call it a suit for nullity does not alter "its essential and real character of a suit for dissolution."

Seven years later, in *Easterbrook* v. *Easterbrook*,[16] Hodson J. refused to follow this decision. It was a husband's petition for nullity on the ground of the respondent's wilful refusal to consummate the marriage. The parties went through a ceremony of marriage in a register office in England, and, thereafter, the petitioner—a soldier serving with the Canadian forces—and the respondent cohabited in this country. The petition, which was undefended, alleged that the petitioner was domiciled in Canada and that the respondent was domiciled in England. There was no protest to the jurisdiction. It was submitted by counsel for the petitioner that the court had the same jurisdiction in nullity suits as was vested in the ecclesiastical courts—and that that was so whether the marriage was void or voidable. It was pointed out in argument [17] that *Inverclyde* v. *Inverclyde* [18] was the first reported case in which it had been held that the husband's domicile was the exclusive test of jurisdiction, and that the decision in that case rested on an obiter dictum of Lord Phillimore in *Salvesen (or Van Lorang)* v. *Administrator of Austrian Property*.[19] In his judgment Hodson J. said [20]: "The petitioner is domiciled in Canada, and the respondent is "domiciled in England. Both parties at all material times were

[15] [1931] P. 29, 41, 42.
[16] [1944] P. 10; 60 T.L.R. 80; [1944] 1 All E.R. 90.
[17] Ibid.
[18] [1939] P. 29.
[19] [1927] A.C. 641; 43 T.L.R. 609.
[20] [1944] P. 10, 11.

1959

HILL (orse. PETCHEY) v. HILL.

Collingwood J.

"resident in England, and the ceremony of marriage was "celebrated in England. The case is undefended, and I have "heard argument only on behalf of the petitioner, who, through "his counsel, has drawn my attention to a number of authorities "dealing with the question of jurisdiction. I have in particular "been referred to *Salvesen* v. *Administrator of Austrian Pro-"perty*,[20a] *Inverclyde* v. *Inverclyde* [21] and *White* v. *White*.[22] As "in *White* v. *White*,[22] so in this case, there has been no appear-"ance and no protest to the jurisdiction, and I am unable, with "all respect to Bateson J., to see the distinction for the purposes "of jurisdiction which he appears to have drawn in *Inverclyde* "v. *Inverclyde* [21] between voidable and void marriages. In my "judgment, on the facts of this case, I have jurisdiction as there "was held to be jurisdiction in *White* v. *White* [22] to pronounce a "decree of nullity on the grounds set out in the petition."

In the same year, in *Hutter* v. *Hutter*,[23] Pilcher J. also declined to follow *Inverclyde* v. *Inverclyde*.[21] In that case the petitioner, a soldier in the United States Army, sought a decree of nullity on the ground that the ceremony of marriage had never been consummated owing to the wilful refusal of the respondent. The petitioner was, according to the report, domiciled in the United States of America, and was on military service in this country when the petition was filed. After the ceremony of marriage the respondent continued to live at the home of her parents in England where she was visited by the petitioner. After hearing arguments by counsel for the petitioner and by the Attorney-General for the King's Proctor, Pilcher J. held that he had jurisdiction to hear the suit. In the course of his judgment Pilcher J., referring to *Simonin* v. *Mallac*,[24] said [25]: "The wife, who had come to live "in this country, sought a decree of nullity here. The marriage "which she had contracted in this country was perfectly good "under English law, and the court entertained the suit, but "dismissed the wife's petition. I refer to this case only because "it decided among other things that the wife, having entered into "a contract of marriage in this country, was subject to the "jurisdiction of the competent court in this country in respect "of her personal status resulting from the marriage so contracted. "It is, moreover, to be observed that under French law the

[20a] [1927] A.C. 641.
[21] [1931] P. 29.
[22] [1937] P. 111.
[23] [1944] P. 95.
[24] 2 Sw. & Tr. 67.
[25] [1944] P. 95, 102.

"marriage in this case appears to have been merely voidable, "and not void. So far as I am aware the proposition that this "court has jurisdiction to inquire into and pronounce on the "validity of every marriage contracted in accordance with "English law in this country has never been questioned." That is, of course, until *Inverclyde* v. *Inverclyde*.[26] Later, Pilcher J. went on to say[27]: "It would seem, therefore, that both on "principle and on authority there is good ground for saying that "in suits for nullity the mere residence of the parties in this "country is sufficient to found the jurisdiction of the court to "pronounce on the validity of a marriage celebrated in England. "If this were not so, it would mean that the competent court "for matrimonial suits in this country renounced jurisdiction in "matters which were within its own peculiar competence, "namely, questions relating to the validity of a marriage con-"tracted in England by persons who, if English, are subject as "such to the laws of this country, and, if foreigners, must be "taken to have subjected themselves to such laws." He concludes his judgment with these words[28]: "In my humble "opinion there is no justification either on principle or on "authority for drawing such a distinction" (that is to say, the distinction drawn in *Inverclyde* v. *Inverclyde*[26] for the purposes of jurisdiction between void and voidable marriages). "Inas-"much as practical questions of status are involved in the "declaration of any court which pronounces on the validity of "a marriage, the court of the domicile of the parties has, no "doubt, a peculiar competence to adjudicate in such suits. The "authorities to which I have referred made it clear, however, "that the courts of this country have not regarded the court of "domicile of the parties as having exclusive competence to "pronounce on the validity of a marriage more particularly "where such marriage has, as in the case now before me, been "celebrated in this country. I accordingly hold that the court "has jurisdiction to entertain the present suit and pronounce a "decree of nullity." As I read this judgment, Pilcher J., in referring to the fact of residence of the parties in this country as founding jurisdiction in the court to pronounce upon the validity of a marriage celebrated in England, was not intending to detract from the previous proposition, that the court has jurisdiction to pronounce on the validity of every marriage contracted in

[26] [1931] P. 29.
[27] [1944] P. 95, 103.
[28] Ibid. 108.

1959

HILL (ORSE. PETCHEY) v. HILL.

Collingwood J.

accordance with English law in this country. He was basing the jurisdiction upon each of these separately—though in fact they were found in conjunction in the case before him.

The decision in *Inverclyde* v. *Inverclyde*,[29] however, was considered, and to some extent restored, in *Casey* v. *Casey*.[30] There a soldier domiciled and normally resident in one of the provinces of Canada (which province is not stated) married an English woman in England. There were short periods of cohabitation, both in England and Canada, after which the wife returned to England and brought a suit for nullity on the ground of the respondent's wilful refusal to consummate the marriage. It was admitted in the petition that at the time when it was filed both parties were domiciled in Canada. The husband did not enter an appearance and took no part in the proceedings. The commissioner found that the husband had wilfully refused to consummate the marriage, but held that the court had no jurisdiction to grant a decree, on the ground that the case was governed by *De Reneville* v. *De Reneville*.[31] The wife appealed. The Court of Appeal held there was no jurisdiction. Bucknill L.J. based his judgment upon two considerations, first that the balance of hardship lay in the respondent's favour, and secondly that a petition to annul a voidable marriage was really indistinguishable from a petition for dissolution. He said[32]: "I find, "therefore, no clear decision on the point as to the jurisdiction "in nullity cases on the ground of wilful refusal to consummate "it, where the marriage has been celebrated in England, but "the respondent husband is domiciled and resident abroad. It "is well established that in a case where the petition is for "dissolution of a marriage the court has no jurisdiction to grant a "decree on the ground that the marriage took place in England, "if the domicile of the husband, and therefore of the wife, is "abroad at the time of the institution of the suit. Such jurisdiction is based exclusively on domicile, as decided by the Privy "Council in *Le Mesurier* v. *Le Mesurier*,[33] and approved by the "House of Lords in *Salvesen's* case.[34] Why, then, should there "be a distinction on the ground of the place of celebration of "marriage, between a petition for dissolution of a valid marriage "and a petition to annul a marriage on the ground of wilful "refusal to consummate it? I can see no good reason for such

[29] [1931] P. 29.
[30] [1949] P. 420; 65 T.L.R. 528.
[31] [1948] P. 100; 64 T.L.R. 82; [1948] 1 All E.R. 56.
[32] [1949] P. 420, 428–429.
[33] [1895] A.C. 517; 11 T.L.R. 481.
[34] [1927] A.C. 641.

"a distinction." Later, Bucknill L.J. said [35]: "My opinion in "favour of dismissing this appeal is based partly on the balance "of hardship to the parties, but mainly on the analogy of the "rule that the court of the domicile of the husband is the sole "court with jurisdiction to dissolve a valid marriage. It seems "to me reasonable that a similar rule should be applied in "principle to a marriage which is merely voidable on the ground "of wilful refusal to consummate it. There may be an excep-"tion to the rule in the case of a voidable marriage where both "parties are resident in the country where the petition is filed, "but I do not see the necessity of making an exception on the "ground that the marriage has been celebrated in the country "where jurisdiction is invoked." Somervell L.J.[36] clearly rejected the basis of the decision in *Inverclyde* v. *Inverclyde* [37]—that is, that a petition to annul a voidable marriage was equated to a petition for divorce—but he was of opinion that in the circumstances of that case the fact of the celebration of the marriage in England did not afford jurisdiction there. Cohen L.J.[38] concurred with the judgment of Bucknill L.J.

The final stage was reached in *Ramsay-Fairfax* v. *Ramsay-Fairfax*.[39] This was a wife's petition for nullity on the ground of the husband's incapacity, or alternatively wilful refusal, to consummate the marriage. The marriage was celebrated in Egypt, under the provisions of the Foreign Marriages Act, 1892, the husband being, at all material times, an officer serving in Her Majesty's Forces. At the time of the presentation of the petition both parties were resident in England. The husband appeared under protest, alleging that he was domiciled in Scotland, and denying that the court had jurisdiction. At the hearing of this issue Willmer J. held, on the facts, that the husband was, at all material times, domiciled in Scotland and the question, therefore, arose whether the court had jurisdiction on the basis of the residence of both parties in England. Willmer J. held [40] that the court had jurisdiction. He pointed out that both in *De Reneville* v. *De Reneville* [41] and in *Casey* v. *Casey* [42] the Court of Appeal expressly left open the question whether the court should exercise jurisdiction over a voidable marriage in a case where both parties were resident in England,

[35] [1949] P. 420, 431.
[36] Ibid. 432–433.
[37] [1931] P. 29.
[38] [1949] P. 420, 434.
[39] [1956] P. 115; [1955] 3 W.L.R. 188; [1955] 2 All E.R. 709.
[40] [1956] P. 115, 116–126.
[41] [1948] P. 100.
[42] [1949] P. 420.

1959

HILL (orse. PETCHEY) v. HILL.

Collingwood J.

and went on to say that the decisions at first instance were conflicting, namely, *Inverclyde* v. *Inverclyde*,[43] where Bateson J. drew a distinction between proceedings for nullity in cases where the marriage is void ab initio, and those where the marriage is merely voidable (as in the case before him) and held that in the latter case nothing short of domicile would suffice to found jurisdiction to entertain the suit. On the other hand, there were the decisions of Hodson J. in *Easterbrook* v. *Easterbrook*[44] and of Pilcher J. in *Hutter* v. *Hutter*,[45] and Willmer J. said[46]: "After careful consideration I do not feel able to do other than "follow the decision of Pilcher J. in *Hutter* v. *Hutter*,[45] a case "which has twice been considered and discussed by the Court of "Appeal without adverse comment."

Against this decision the husband appealed.[47] Denning L.J. gave the first judgment and, after stating the facts, he said[48]: "The jurisdiction in nullity cases is, in my judgment, entirely "different from the jurisdiction in cases of divorce. In cases of "divorce, ever since *Le Mesurier* v. *Le Mesurier*[49] in 1895, the "only courts which have had jurisdiction to decree a dissolution "of a marriage are the courts of the domicile; but the jurisdic-"tion of our courts in nullity cases is different, dating from 1857, "when, by section 22 of the Matrimonial Causes Act, 1857, it "was said . . ." Then he quoted the section to which I referred at the beginning of this judgment, and continued[50]: "That "section shows plainly that the jurisdiction in nullity suits "depends on the principles and rules which were observed in "the ecclesiastical courts before 1857. It is true that the grounds "of nullity have since been extended, but nevertheless, in my "opinion, all suits for nullity, whether on the original grounds—"for instance, for incapacity—or on the new grounds—for "instance, for wilful refusal—are to be governed by the prin-"ciples and rules which were observed in the old ecclesiastical "courts. It is quite clear that the ecclesiastical courts based "their jurisdiction in cases of nullity on residence, not upon "domicile. If the respondent, the defendant to a petition, was "resident within the local jurisdiction of the court, then the "court had jurisdiction to determine it. So in the present case. "The husband and wife were, at the issuing of the petition, both

[43] [1931] P. 29.
[44] [1944] P. 10.
[45] [1944] P. 95.
[46] [1956] P. 115, 125.
[47] [1956] P. 126; [1956] 3 W.L.R. 849; [1955] 3 All E.R. 695.
[48] [1956] P. 126, 131.
[49] [1895] A.C. 517.
[50] [1956] P. 126, 131–132.

" resident in this country, and that is sufficient to give the court " jurisdiction to decide the case. So much seems to me plain on " the interpretation of the statutes. In addition, in *Baxter* v. " *Baxter*,[51] in the House of Lords in 1948, Viscount Jowitt L.C. " said that section 22 manifestly applied to suits for nullity on " the ground of incapacity. It must also apply to suits on the " new ground of wilful refusal. That is a sufficient ground for " the determination of this case, but, as there has been much " difference of opinion on this matter, I must say a word about " *Inverclyde* v. *Inverclyde*,[52] in which Bateson J. held that in a " case of nullity on the ground of impotence the only court " which had jurisdiction was the court of the domicile. The " basis of his reasoning was that a case of nullity, whether for " impotence or for wilful refusal, was much more like a suit for " divorce than anything else; and that it should be equated, so " to speak, with a suit for dissolution and be governed solely by " the law of the domicile, so that the only courts which should " have jurisdiction should be the courts of the domicile. He " said, in a sentence, ' To call it a suit for nullity does not alter " ' its essential and real character of a suit for dissolution.' [53] " I beg to differ from this view. Looking at the ground of wilful " refusal from a legalistic standpoint, and treating marriage as a " contract, the remedy of nullity does look like a remedy of " divorce or dissolution, because it depends on events which " occur subsequent to the marriage; but looking at it from a " sensible standpoint, and having regard to the true ends of " marriage, one of the principal aims of which is the procreation " of children, it seems to me that the remedy falls more truly " within the category of nullity. No one can call a marriage a " real marriage when it has not been consummated; and this is " the same, no matter whether the want of consummation is due " to incapacity or to wilful refusal. Let the theologians dispute as " they will, so far as the lawyers are concerned, Parliament has " made it quite plain that wilful refusal and incapacity stand " together as grounds of nullity and not for dissolution; and " being grounds of nullity, they fall within the old ecclesiastical " practice, in which the jurisdiction of the courts is founded upon " residence and not upon domicile." Then, after referring [54] to the argument which had been advanced by counsel, Denning

[51] [1948] A.C. 274; 64 T.L.R. 8; [1947] 2 All E.R. 886.
[52] [1931] P. 29.
[53] Ibid. 42.
[54] [1956] P. 126, 133.

1959

HILL (orse. PETCHEY) v. HILL.

Collingwood J.

L.J. continued [54]: "It is to be noticed that in 1944 there "were two cases, *Easterbrook* v. *Easterbrook*, before Hodson J., "and *Hutter* v. *Hutter*, before Pilcher J., in which it was "held that the English courts have jurisdiction in nullity "cases where both parties are resident here. In the first of "those cases a Canadian soldier married an English woman here, "and it was held that although he was domiciled in some province "in Canada, nevertheless the courts here had jurisdiction to "determine his claim for nullity. Any other view would be most "unfortunate. It would be absurd that a Canadian soldier "married to an English woman should have to go to the courts "of Canada to get his remedy (or, conversely, that she should) "when they were both resident here. The next case was that of "a United States soldier who married an English woman here. "Again it was held that the courts in this country had jurisdic-"tion even though the soldier was domiciled in one of the states "of America. It is far too late in the day to say that those two "cases were wrongly decided, considering that many decrees "must have been given on the self-same footing, and that many "people have regulated their affairs on the basis of them. It "would be very wrong to suggest now that those decisions were "bad, and that the people who have acted on them have been "guilty of bigamy. I am clearly of opinion that those two cases "were rightly decided and should be upheld: but *Inverclyde* v. "*Inverclyde* was wrongly decided and should be overruled."

Then he concluded [55]: "One more word. It may be in these "nullity cases that the courts of the domicile also have jurisdic-"tion: so may the courts of the place where the marriage was "celebrated: but the courts where both parties reside certainly "have jurisdiction. I find myself in agreement with Willmer J. "and would dismiss the appeal."

Hodson L.J. said [56]: "The question in this case is whether "the court has jurisdiction to entertain a petition for nullity "where the parties are resident in this country. The field of "jurisdiction in nullity cases is a very wide one. There are a "great many cases which have been discussed by judges and by "professors, and it is not always easy to see whether in a given "case the decision can be justified or, if it can be justified, the "precise ground on which it ought to be supported. But in this "case I have no doubt that the decision of the judge was right "for the reasons which he gave. I agree also with the reasoning

[55] [1956] P. 126, 134. [56] Ibid.

" of Pilcher J. in *Hutter* v. *Hutter*,[57] which I think put this class " of case on the right footing, basing his judgment, as he did, on " the ecclesiastical jurisdiction and the way in which that juris- " diction was exercised." Morris L.J. said [58] that he was of the same opinion.

Dr. Cheshire, in Private International Law (5th edition, at p. 348, note 5) suggests that Denning L.J. was perhaps "misled" into saying what he did in *Ramsay-Fairfax* v. *Ramsay-Fairfax* [59] by the decision in Northern Ireland in the case of *Addison* v. *Addison*.[60] In that case the facts were: the ceremony of marriage was celebrated in Northern Ireland where the wife petitioner was then domiciled and resident. The respondent was a serving soldier domiciled in England. After the respondent was demobilised the parties lived in England for a very short time, after which they separated and the petitioner returned to Northern Ireland, while the respondent continued to live in England. The petitioner presented a petition to the High Court in Northern Ireland seeking annulment of the marriage on the ground of the respondent's impotence, or alternatively, on the ground of his wilful refusal to consummate the marriage. Lord MacDermott C.J. found, as a fact, that at all material times the respondent was incapable of consummating the marriage by reason of impotence and held [61] (inter alia) (i) that the residence of the petitioner within the jurisdiction was not, of itself, sufficient to confer jurisdiction on the court. In this he followed *De Reneville* v. *De Reneville*.[62] (ii) That in the exercise of the jurisdiction to annul a marriage there was no ground for distinguishing between a void marriage and a voidable marriage—and, as the courts of England and Ireland had long exercised jurisdiction to annul void marriages celebrated within the jurisdiction irrespective of the domicile or residence of the parties, there was power in the court to pronounce a decree of nullity in the case before him on the ground that the marriage was celebrated in Northern Ireland. Lord MacDermott C.J., after a careful consideration of *Inverclyde* v. *Inverclyde* [63] and *Casey* v. *Casey*,[64] felt unable to follow them.[65] It is to be noted that section 13 of the Matrimonial Causes and Marriage Law (Ireland)

[57] [1944] P. 95.
[58] [1956] P. 126, 135.
[59] Ibid. 134.
[60] [1955] N.I. 1.
[61] Ibid. 15, 33.
[62] [1948] P. 100
[63] [1931] P. 29.
[64] [1949] P. 420.
[65] [1955] N.I. 1, 15, 33.

1959

HILL (orse. PETCHEY) v. HILL.

Collingwood J.

Amendment Act, 1870, makes the same provision as to conformity with the principles and rules on which the ecclesiastical courts acted as section 22 of the Matrimonial Causes Act, 1857.

The decision in *Casey* v. *Casey* is, of course, binding upon this court. But it was submitted by counsel for the wife, and by counsel for the Queen's Proctor, that the overruling of *Inverclyde* v. *Inverclyde* in *Ramsay-Fairfax* v. *Ramsay-Fairfax* [66] necessitated careful review of the grounds upon which *Casey* v. *Casey* was decided, and that the decision in that case should be confined strictly to the facts which were before the court. In my opinion this submission is correct. In *Casey* v. *Casey* the ground of the petition was wilful refusal to consummate the marriage. At the conclusion of the leading judgment Bucknill L.J., after saying that he based his opinion mainly on the analogy with the rule that the court of the domicile of the husband is the sole court with jurisdiction to dissolve a valid marriage, added [67]: "It seems to me reasonable that a similar rule should be applied "in principle to a marriage which is merely voidable on the "ground of wilful refusal to consummate it." Incidentally, the headnote appears to extend this by the insertion of the letters "e.g." before the words "On the ground of wilful refusal."

In a case of wilful refusal a valid marriage is a condition precedent to the cause of complaint—the duty to consummate depends on the existence of a valid marriage. Where, however, as in the present case, the ground of the petition is impotence, the cause of complaint is that the respondent was, at the time of the ceremony and has, ever since, been incapable of consummating it. This was the matter dealt with by the ecclesiastical courts, who knew nothing of wilful refusal as, of itself, affording a ground for relief. The impotence recognised by the ecclesiastical courts as a ground for annulment had to exist at the time of the marriage ceremony—and on proof of this an essential element in the contract was held to have been missing. Thus in *Greenstreat* v. *Cumyns* [68] Sir William Scott held that a marriage was impeachable if "there was incapacity on the part of the man" (or woman) "to perform the duties of marriage; a capacity to "perform which is necessary to render it valid." In *Dickinson* v. *Dickinson* [69] Sir Samuel Evans P. said [70]: "It has always "been held that the contract of marriage implies the ability to

[66] [1956] P. 126.
[67] [1949] P. 420, 431.
[68] (1812) 2 Hag.Con. 332.
[69] [1913] P. 198; sub nom. *D.* v. *D.*, 29 T.L.R. 765.
[70] [1913] P. 198, 205.

"consummate it," and the form of the decree in such a suit was to declare the marriage "esse et fuisse nullum." The ecclesiastical courts having no power to dissolve, this was the only form of declaration open to them, irrespective of the question whether the marriage ceremony itself was unexceptionable as to form, and without any distinction between void and voidable marriages. In *Lewis* v. *Hayward*[71] the House of Lords held that the proper order in a wife's suit for nullity on the ground of impotence was "it is declared that the said marriage . . . "was null and void ab initio."

The result of the authorities appears, therefore, to be: (1) The jurisdiction in suits for nullity depends upon the practice of the ecclesiastical courts. (2) Though a petition to annul a voidable marriage is, in some respects, analogous to one for dissolution, the attempt to equate them in *Inverclyde* v. *Inverclyde*[72] has been held to have been erroneous. (3) In *Ramsay-Fairfax* v. *Ramsay-Fairfax*[73] not only was *Inverclyde* v. *Inverclyde*[72] overruled, but the Court of Appeal expressly approved of the decisions in *Easterbrook* v. *Easterbrook*[74] and *Hutter* v. *Hutter*,[75] and as regards the latter case expressly approved the reasoning of Pilcher J. (4) From 1860 onwards there is a long line of decisions in which the courts have exercised jurisdiction in nullity suits on the ground of the celebration of the marriage in England. While it is true that, with the exception of *Simonin* v. *Mallac*,[76] the decisions appear to be concerned with void marriages, it is equally clear that the distinction between void and voidable had no significance in the ecclesiastical courts so far as jurisdiction was concerned. (5) The general proposition that, apart from any other consideration, the court has jurisdiction because the marriage was celebrated in England (a proposition accepted by Lord MacDermott C.J. in *Addison* v. *Addison*[77] in regard to a marriage in Northern Ireland) is limited, so far as this court is concerned, by the decision in *Casey* v. *Casey*.[78] That is to say, it does not apply where the ground is wilful refusal to consummate the marriage. But so far as the fundamentally different ground of incapacity is concerned, there is nothing in the authorities which precludes the court from assuming jurisdiction where the marriage was celebrated in this country.

[71] (1866) 35 L.J.P. & M. 105, 109.
[72] [1931] P. 29.
[73] [1956] P. 126.
[74] [1944] P. 10.
[75] [1944] P. 95.
[76] 2 Sw. & Tr. 67.
[77] [1955] N.I. 1.
[78] [1949] P. 420.

1959

HILL (ORSE. PETCHEY) v. HILL.

I, therefore, hold that the court has jurisdiction and grant a decree accordingly.

Order accordingly.

Solicitors: *Montagu's & Cox & Cardale; Queen's Proctor.*

E. J.

C. A.

1960
Mar. 16, 17; *April* 5.

Hodson, Willmer and Devlin L.JJ.

BLACKER *v.* BLACKER.

Husband and Wife—Desertion—Three years from presentation of petition — Amendment to pleading — Amendments of cross-petition and reply to cross-petition to allege desertion—Three years' desertion not completed at date of original petition and answer—Three years' desertion completed at date of hearing—Validity of amendments—Effect of disposing of original prayer before allowing amendments—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 1 (1) (*b*)—*Matrimonial Causes Rules,* 1957 (*S.I.* 1957, *No.* 619), *r.* 3 (2)—*R.S.C., Ord.* 70, *r.* 1.

Practice—Non-compliance with rule of court—Dispensation by court—Whether court empowered to authorise disregard of rule in advance—New petition for divorce before prior petition disposed of—R.S.C., Ord. 70, *r.* 1.

A wife petitioned for dissolution of marriage on the ground of cruelty, and her husband, by his answer, also sought a dissolution of marriage on the ground of cruelty. Neither charge of cruelty succeeded. At the time of the hearing the parties had been separated for the three years immediately preceding thereto, although they had not been separated for three years immediately preceding the presentation of the petition and the answer.

The husband was given leave to amend his answer by way of cross-petition to allege desertion by the wife and to ask for a decree nisi on that ground; the wife was similarly given leave to amend her reply by adding an answer to the cross-petition alleging desertion by the husband. Both charges of desertion were dismissed, and on appeal therefrom, the court took the point that the judge had no jurisdiction to allow those amendments:—

Held, (1) that the allegations of desertion could not be raised merely by amendment, since that would be to defeat the plain language of section 1 (1) (*b*) of the Matrimonial Causes Act, 1950,[1] which required the period of three years to elapse not before the

[1] Matrimonial Causes Act, 1950, s. 1 (1): " . . . a petition for divorce " may be presented to the court either " by the husband or the wife on the " ground that the respondent . . . " (*b*) has deserted the petitioner with- " out cause for a period of at least " three years immediately preceding " the presentation of the petition. . . ."

amendment of, but before the presentation of the petition (post, p. 150).

Spawforth v. *Spawforth* [1946] P. 131; 62 T.L.R. 262; [1946] 1 All E.R. 379 applied.

Thatcher v. *Thatcher* [1959] 1 W.L.R. 730; [1959] 2 All E.R. 649 and *Swiszczowski* v. *Swiszczowski* [1959] 1 W.L.R. 187; [1959] 1 All E.R. 495 overruled.

(2) That if the amended cross-petition and the reply thereto be regarded as separate petitions, rule 3 (2) of the Matrimonial Causes Rules, 1957,[2] had not been complied with, since the original petition and answer had not been disposed of when the amendments were made; that non-compliance with that rule was a substantive objection and not a mere technicality, and the order purporting to dispose of the cross-charges of desertion was a nullity (post, pp. 151, 152, 154).

Per Willmer L.J. Although he expressed no concluded opinion on the matter, possibly the same objection [under rule 3 (2)] could not have been taken if, in the present case, the judge had been invited first to dispose of the prayer and cross-prayer for relief in the original petition and answer before leave was asked to make the amendments (post, p. 155).

Per Hodson L.J. Although the court had power under R.S.C., Ord. 70, r. 1,[3] to dispense with the requirements of rules where justice required, it did not follow that the court, notwithstanding the consent of the parties, could authorise disregard of the rules in advance (post, p. 151).

Per Devlin L.J. (1) He was not satisfied that the court had power, even with the consent of the parties, to dispense in advance with compliance with any of the Rules of the Supreme Court; the procedure under Order 70, r. 1, could be used to cure irregularities, but it did not authorise in advance disregard of the rules, and it ought not to be supposed that it was automatically available for curing deliberate infraction of any rule. (2) Even if there was any such power it ought to be used only in the most exceptional circumstances. (3) He doubted whether the court should use any powers it might have to assist parties who, having failed in one claim for relief, sought priority in bringing another. (4) A rule was not dispensed with merely by ignoring it (post, pp. 156, 157).

APPEAL and CROSS-APPEAL from Judge Rewcastle.

The following statement of facts is taken substantially from the judgment of Willmer L.J.: The parties were married on

[2] Matrimonial Causes Rules, 1957, r. 3 (2): "A petition shall not be "filed if there is before the court "another petition by the same peti- "tioner which has not been dismissed "or otherwise disposed of by a final "order."

[3] R.S.C., Ord. 70, r. 1: "Non- "compliance with any of these rules "... shall not render any proceedings "void unless the court or a judge "shall so direct, but such proceedings "may be set aside either wholly or in "part as irregular, or amended, or "otherwise dealt with in such manner "and upon such terms as the court or "judge shall think fit."

C. A.
1960
BLACKER
v.
BLACKER.

February 29, 1936, and cohabited until December 31, 1955, when the husband left the wife. There had been no cohabitation since that date. The wife's petition was filed on April 3, 1957, and by it she prayed for a decree of dissolution on the ground of cruelty. By his answer, dated May 13, 1957, the husband denied the charges of cruelty, and himself cross-prayed for a decree of dissolution on the ground of cruelty on the part of the wife. The wife filed a reply, dated July 26, 1957, denying the husband's charges of cruelty and repeating the prayer of the petition. At this stage a period considerably less than three years had elapsed since the date of the separation. The case came on for trial on June 2, 1959, and the hearing which extended over several days lasted until June 8, 1959. During the course of the trial the husband withdrew his charges of cruelty against the wife, but the wife persisted in her charges throughout. The commissioner found that no cruelty had been proved on either side, and there had been no appeal on this point.

By the time of the trial more than three years had elapsed since the date of the separation; and in those circumstances, at some time during the trial leave was obtained by the husband to amend his answer by adding a cross-petition alleging desertion against the wife during the period of three years preceding the presentation thereof; and at the same time leave was granted to the wife to amend her reply by adding an answer to the cross-petition, whereby she in turn alleged desertion against the husband. The amendments allowed were in the following terms: "And it is ordered that the respondent [the husband] do amend "the answer by way of cross-petition to allege desertion . . . and "that service be effected in court. And it is ordered that the "petitioner [the wife] do amend her reply by way of answer to "the cross-petition to allege desertion . . . and that service be "effected in court." Those amendments were duly made and supported by affidavits pursuant to rule 15 of the Matrimonial Causes Rules, 1957. On June 8, 1959, the commissioner gave judgment and dismissed both charges of desertion; it was against the dismissal of those charges that the present appeal and cross-appeal were brought.

At the hearing of the appeal the court took the point whether the judge had jurisdiction to make the amendment.

David Karmel Q.C. and *A. B. Hollis* for the wife (the petitioner). The court has jurisdiction to allow the wife's amendment to her reply by adding an answer to the cross-petition asking

for a decree on the ground of the husband's desertion. Although he had not been in desertion for the three years immediately preceding the presentation of the original petition as provided by section 1 (1) of the Matrimonial Causes Act, 1950, he was in desertion for three years immediately preceding the hearing, and it has been the practice in the Divorce Division to allow desertion to be alleged in such circumstances, even by way of amendment at the trial: *Thatcher* v. *Thatcher*[4]; *Swiszczowski* v. *Swiszczowski*.[5]

The petitioner's case on desertion was not really argued in the court below and it would work hardship on her if her case could not be presented in this court on account of what is in effect a technicality.

The wife cannot put a fresh petition on the file while the present one is still undisposed of without contravening rule 3 (2) of the Matrimonial Causes Rules, 1957; but if this petition were dismissed, and a fresh petition based on desertion filed tomorrow in which she asks for the same relief as she is now seeking by way of amendment, the only difference would be delay and great increase in costs. Rule 3 (2) does not preclude a party from asking for relief in a petition and in answer at the same time, e.g., in consolidated suits. It is submitted that the amendment is not contrary to the intention of the Act, since the wife is alleging three years' desertion immediately before the date of the proposed amendment to her reply and the cross-petition she seeks to add is in the same position as an original petition for the purpose of seeking relief.

The court has power, moreover, to remedy the failure to comply with rule 3 (2) under R.S.C., Ord. 70, r. 1.

F. Donald McIntyre Q.C. and *Derek Wheatley* for the husband (the respondent) supported the argument for the proposed amendment. Although *Spawforth* v. *Spawforth*[6] and *Sandler* v. *Sandler*[7] may provide authority that an amendment to an original petition cannot be used to cure the failure to prove three years' desertion immediately preceding its presentation, they are not authority for the proposition that such an amendment cannot be allowed on an answer to the petition, the words of the statute being "immediately preceding the presentation of the petition," and they do not limit the answer in the same way as they limit the grounds in the petition. The court is not constrained to read

[4] [1959] 1 W.L.R. 730; [1959] 2 All E.R. 649.

[5] [1959] 1 W.L.R. 187; [1959] 1 All E.R. 495.

[6] [1946] P. 131; 62 T.L.R. 262; [1946] 1 All E.R. 379.

[7] [1934] P. 149; 50 T.L.R. 397, C.A.

C. A.
1960
BLACKER v. BLACKER.

the statute in a restrictive manner which involves hardship. The respondent does not initiate proceedings and therefore time should run in his favour.

It was held in *Robertson* v. *Robertson*[8] that a respondent could amend an answer by adding a cross-petition for desertion, there being three years' desertion immediately before the amendment but not before the original answer. It is sufficient, therefore, if the husband can allege three years' desertion immediately preceding this amendment, which he clearly can do. Many divorces have been granted by reason of this practice, and this court should not lightly hold that these marriages were dissolved erroneously. The judge will not fail to discern the occasional false case and then refuse leave to amend.

Cur. adv. vult.

April 5. The court delivered the following written judgments:

HODSON L.J., having stated the facts, continued: The order of the judge shows that he dismissed the husband's cross-petition based on desertion, and also the wife's charge of desertion contained in her amended reply, which, although not described as a new petition, was in effect such.

There appears to have been some confusion as a result of these amendments adding additional charges because, although the judge dismissed both charges of desertion in his order, he made no reference at all to the wife's charge of desertion in his spoken judgment. He cannot be criticised for this since he was addressed by her counsel in his final speech on the issue of cruelty alone. Both parties have appealed against the dismissal of the charges of desertion and have asked this court to pronounce a divorce on the ground of desertion; and in the case of the petitioner there is the anomalous position that she is relying, as her main ground of appeal, on the judge's failure to deal with the charge of desertion which she did not press before him.

The question is whether there is in this suit any jurisdiction to deal with the desertion issue which each party now seeks to raise. This cannot be done simply by amendment, for that would be to defeat the plain language of the statute, which requires the period of three years to elapse not before the amendment of but before the presentation of the petition. Compare *Spawforth* v. *Spawforth*,[1] where an attempt was made to circumvent the statute

[8] [1954] 1 W.L.R. 1537; [1954] 3 All E.R. 413n.

[1] [1946] P. 131; 62 T.L.R. 262; [1946] 1 All E.R. 379.

by a supplemental petition, three years' desertion not having run before the date of the petition but having expired before the date of the supplemental petition. The supplemental petition was held to be the equivalent for this purpose of an amendment: see *Sandler* v. *Sandler*.[2] The attempt accordingly failed.

The question is, can the same result be achieved by cross-petition? The answer to this is in the affirmative if the three years have expired before the presentation of a cross-petition. For this purpose an original answer may be regarded as a cross-petition: see *Faulkner* v. *Faulkner*,[3] for by section 6 of the Matrimonial Causes Act, 1950, the court may give to the respondent the same relief to which he or she would have been entitled if he or she had presented a petition seeking for such relief.

If there is a separate cross-petition there is no obstacle to this being consolidated with the original petition; and in *Robertson* v. *Robertson*[4] Barnard J. allowed a cross-petition to be included in an answer when no cross-relief had been previously sought, thus avoiding the necessity of a separate suit and consolidation, etc. This does not mean that where the respondent has already prayed for relief in his answer and thus placed himself in the position of a petitioner, a further petition can be presented by him before the first has been disposed of.

The same applies to the original petitioner. If, as in this case, she has presented a petition based on cruelty, she cannot present a fresh petition based on desertion until the first has been disposed of. To do so is to contravene rule 3 (2) of the Matrimonial Causes Rules, 1957, which provides: "A petition shall not be filed if "there is before the court another petition *by the same petitioner* "which has not been dismissed or otherwise disposed of by a "final order." The cross-petition in the answer based on desertion and the equivalent contained in the reply were plainly filed in breach of this rule.

The rules have statutory effect, and although no doubt the court has a power after the event, under R.S.C., Ord. 70, r. 1, to dispense with the requirements of rules where justice requires and needless inconvenience would otherwise result, it does not follow that, notwithstanding the consent of the parties, the court can authorise disregard of the rules in advance. It has not been and cannot be contended that in this case the first petition of the

[2] [1934] P. 149; 50 T.L.R. 397, C.A.

[3] (1941) 57 T.L.R. 628; [1941] 2 All E.R. 748, D.C.

[4] [1954] 1 W.L.R. 1537; [1954] 3 All E.R. 413n.

C. A. 1960

BLACKER v. BLACKER.

Hodson L.J.

petitioner or its equivalent by the respondent were dismissed or wholly disposed of by final order before the new petitions were presented, and, indeed, the situation was so confused that the wife's allegation of desertion was apparently forgotten.

No application either to dispense with the rule or to dispose of the cruelty first was ever made. The more substantial objection is, however, that to allow this course to be taken would be to ignore the plain language of the statute by enabling a petitioner or respondent to pray for relief on some ground other than desertion, and later at the hearing treat the statute as having provided that the relevant period of desertion expired at the hearing and not at the presentation of the petition.

Rule 3 (2) deals with substance and not with mere technicality. It is just that a petitioner should not be allowed to present a fresh petition until the first has been disposed of, and reasonable that in a situation like the present the petitioner and respondent should, before launching against one another charges of cruelty, which are notoriously easy to make, at least reflect what the consequences may be if their charges turn out to be groundless.

In my opinion, leave to amend by alleging desertion was wrongly given, although again no criticism can be levelled against the judge, who, in giving leave, had followed the decisions of Karminski J. in *Thatcher* v. *Thatcher*[5] and *Swiszczowski* v. *Swiszczowski*,[6] both of which cases were, I think, wrongly decided.

Apart altogether from the provisions of rule 3 (2), which must certainly, where desertion as a ground for divorce is concerned, be strictly adhered to, it is right that where the requirements, even what may be regarded as the technical requirements, of the rules concerned are being dispensed with, this should be stated in the order made by the court. Affidavits in support, service, time for appearance and answer and registrar's certificate are all matters subject to rules of court. If these provisions or some of them are simply ignored it is not to be wondered at that a muddle will occur.

These appeals must be dismissed, on the ground that neither the petitioner's nor the respondent's allegations of desertion have been effectively before the court as grounds for dissolution of the marriage.

WILLMER L.J. The appeal and cross-appeal in this case are both confined to the issue of desertion which was raised by the

[5] [1959] 1 W.L.R. 730; [1959] 2 All E.R. 649.

[6] [1959] 1 W.L.R. 187; [1959] 1 All E.R. 495.

respondent husband's cross-petition and the petitioner wife's answer thereto contained in her amended reply. I also have come to the conclusion that both appeal and cross-appeal must be dismissed, for the reason that the commissioner, having regard to the course that was taken at the hearing, would have had no jurisdiction to grant relief to either party on the ground of desertion. Consequently, his dismissal of the cross-charges of desertion is not a matter in respect of which complaint can properly be made to this court.

It is a regrettable fact that the difficulties in which the parties now find themselves arise out of a laudable desire to save costs. If I thought that these difficulties were of a purely technical nature, I should, for my part, have been disposed to struggle hard to find a way of overcoming them. But I am satisfied that the objection to the course which was adopted in this case is one of substance, and that if that course were regularly followed it might lead to an abuse of the process of the court and to the possible prejudice of parties in other suits. For it would be open to parties, whose only real case was one of desertion, to file a petition or answer before the expiration of the necessary three years praying for relief on sham grounds—with the possibility perhaps of obtaining thereby various forms of interim relief—and then, as soon as the three years have elapsed, to obtain leave to file a cross-petition and an answer thereto alleging desertion, with the possible effect of obtaining undue expedition of their case in priority to other litigants. [His Lordship stated the facts as set out above and continued:]

When the appeal on behalf of the wife was opened a question was immediately raised as to the propriety of the course taken by the commissioner in allowing the charges of desertion to be raised in the present proceedings. The question is whether it is permissible for a respondent, when an answer is already on the file containing a prayer for substantive relief, to be given leave to amend that answer, once the necessary period of three years has elapsed, by adding a cross-petition for relief on the ground of desertion. This was a course taken in *Swiszczowski* v. *Swiszczowski*[7] and in *Thatcher* v. *Thatcher*,[8] both of which were relied on to justify what was done in the present case. If that course is permissible, I think that the further step taken in *Thatcher* v. *Thatcher*,[8] and followed in this case, of granting leave to amend the reply by adding an answer to cross-petition

[7] [1959] 1 W.L.R. 187.

[8] [1959] 1 W.L.R. 730.

C. A. 1960

BLACKER v. BLACKER.

Willmer L.J.

containing a cross-prayer for relief on the ground of desertion would be an almost necessary corollary.

Having considered the propriety of this procedure I have been unable to see any escape from the dilemma that was put during the argument. Either the cross-petition and the answer thereto are to be regarded as one with the original petition and answer, or else they must be regarded as separate proceedings. If they are to be regarded as one with the original petition and answer, then they are no different from a supplemental petition and answer, and must be held to speak from the dates of the original petition and answer. That seems to me to be the effect of *Spawforth* v. *Spawforth* [9] and *Chapman* v. *Chapman*,[10] following the decision of this court in *Sandler* v. *Sandler*.[11] If that is the correct view, it will not help the parties in the present case, since three years had not elapsed at the date of either the original petition or the original answer.

If, on the other hand, as I think, the cross-petition and the answer thereto are to be regarded as separate proceedings from the original petition and answer, it seems to me that the effect of rule 3 (2) of the Matrimonial Causes Rules, 1957, is to forbid their being filed unless and until the original proceedings have been finally disposed of. It was suggested in argument that R.S.C., Ord. 70, r. 1, could be invoked, so as to enable the court to dispense with the application of rule 3 (2) of the Matrimonial Causes Rules, 1957. In that connection our attention was called to a note (at p. 1600) of the Annual Practice for 1957. But this note has not been repeated in the current edition of the Annual Practice, and no case has been called to our attention in which strict compliance with rule 3 (2) of the Matrimonial Causes Rules, 1957, has been dispensed with. It seems to me that, if we are to regard the cross-petition and the answer thereto as proceedings entirely separate from the original petition and answer—as we must, if either party is to be able to allege desertion for three years—rule 3 (2) is a fatal objection to the course that has been taken. If that rule is to be complied with, it must follow that leave cannot properly be granted to file a cross-petition or an answer thereto, unless and until the prayers for relief in the original petition and answer have been disposed of, which was not done in this case.

This conclusion necessarily involves that we must hold the

[9] [1946] P. 131.
[10] [1938] P. 93; 54 T.L.R. 462; [1938] 1 All E.R. 635, D.C.
[11] [1934] P. 149.

course taken in *Swiszczowski* v. *Swiszczowski* [12] and *Thatcher* v. *Thatcher* [13] to have been misconceived and unjustified. The procedure followed in those cases was in purported pursuance of the decision in *Robertson* v. *Robertson*.[14] In that case also leave was granted to amend the answer, after the expiration of the necessary three years, so as to add a cross-petition alleging desertion. But I think it is possible to distinguish what was done in that case, on the ground that there the original answer contained no prayer for substantive relief. It can, therefore, be said that the course taken in that case did not offend against rule 3 (2), since there was nothing equivalent to a "petition" by the respondent already on the file. The vice of what was done in the present case was that leave to institute fresh proceedings by adding the cross-petition and the answer thereto was granted at a time when the prayer and cross-prayer for substantive relief on the ground of cruelty in the original petition and answer were still on the file and undisposed of.

Though I do not find it necessary to express any concluded opinion on the matter, it occurs to me that possibly the same objection could not have been taken if in the present case the commissioner had been invited first to dispose of the prayer and cross-prayer for relief in the original petition and answer, before leave was asked to amend the answer by adding a cross-petition and the reply by adding an answer to cross-petition. Had that been done, and had the parties then asked leave to institute their fresh proceedings by adding a cross-petition and an answer thereto, it may be that the commissioner could properly have acceded to the request, and with the consent of the parties could then have given the necessary directions for abridgement of time, dispensing with the registrar's certificate, and so forth, so as to enable him to dispose of the issue of desertion while he was yet seised of the case, and thus avoid the necessity for the parties to incur the additional costs of a fresh trial before another judge. It would appear from the report of *Chapman* v. *Chapman* [15] that this was the course in fact adopted in that case. If this is so, I should not wish, as at present advised, to be regarded as dissenting from it.

Be that as it may, in the present case I can see no ground on which we can say that the course adopted by the commissioner was other than irregular. The irregularity was such that, in my

[12] [1959] 1 W.L.R. 187.
[13] [1959] 1 W.L.R. 730.
[14] [1954] 1 W.L.R. 1537.
[15] [1938] P. 93.

C. A.
1960
BLACKER
v.
BLACKER.
Willmer L.J.

judgment, this court can do no other than direct, in pursuance of Order 70, r. 1, that the proceedings instituted by way of cross-petition and answer thereto were void. It follows, therefore, that in so far as the commissioner's order purported to dispose of the cross-charges of desertion it was a nullity. So far as these charges are concerned, accordingly, there is no valid order from which to appeal. Appeal and cross-appeal must be dismissed, leaving the parties free to institute such fresh proceedings as they may be advised.

DEVLIN L.J. I agree that the cross-petition and answer thereto should be declared void for the reasons given by my Lords and that, accordingly, the appeal and cross-appeal should be dismissed.

We have listened to some discussion about the propriety of the decision in *Robertson* v. *Robertson*,[16] and about whether the present difficulties could have been surmounted if the original proceedings had first been dismissed so that no breach of rule 3 (2) of the Matrimonial Causes Rules, 1957, was involved. On this point I wish to make some observations.

First, I am not satisfied that the court has power, even with the consent of the parties, to dispense in advance with compliance with any of the rules of the Supreme Court, these being made under the authority of an Act of Parliament. I should wish to hear that point fully argued before reaching any conclusion upon it. The procedure under Order 70, r. 1, can be used after the event to cure irregularities, especially those brought about by inadvertence. But the order does not authorise in advance disregard of the rules, and it ought not to be supposed that it is automatically available for curing the deliberate infraction of any rule, even the least important.

Secondly, I consider that if there is any such power it ought to be used only in the most exceptional circumstances. The rules themselves provide various methods of saving costs and expediting proceedings in appropriate cases—as, for example, provision for an early trial (R.S.C., Ord. 50, r. 1A, and Ord. 64, r. 9), and the formulation by consent of an issue for trial without pleadings (Ord. 34, r. 9). I think that the court should be slow to attempt the invention of other methods.

Thirdly, I doubt whether the court should use any powers it may have to assist parties who, having failed in one claim for relief, seek priority in bringing on another. I appreciate that the

[16] [1954] 1 W.L.R. 1537.

chief object in these cases is to save costs and that is always tempting. But two things ought to be borne in mind. The first is that, if relief is to be granted in one case, it ought to be granted in all cases of the same type; and there must be many cases of the type in which a petitioner has unsuccessfully brought cruelty charges before the period of desertion has been completed. If relief is to be given in a class of case, it ought surely to be done by means of an alteration to the rules and not by the action of an individual judge, which should, I think, be reserved for exercise in circumstances peculiar to the case before him. The second thing to be borne in mind is that it is not in the public interest that charges of cruelty should be made when the real case, if there is one, is one of desertion. Willmer L.J. has pointed out the danger that a spouse, whose real case is one of desertion, may be tempted to file a petition before the expiration of the necessary three years, praying for relief on sham grounds in order that a charge of desertion, made as soon as the three years have expired, may obtain a hearing earlier than if it had been made in the ordinary way. Apart from the danger of abuse, it cannot be desirable that a party who makes charges of cruelty which he cannot prove should obtain a divorce more quickly than one who, taking a more balanced view of such conjugal unkindnesses as may have occurred, decides to wait for the period of desertion to be completed.

My final observation is that a rule is not dispensed with merely by ignoring it. If that were so, then rule 3 (2) could be taken as having been dispensed with in this case, and none of the difficulties we have been considering would have arisen. If rules are to be dispensed with, presumably under some inherent power of the court, I think that there should be an order specifying precisely what is being done. The order made in this case—" that the " respondent do amend the answer by way of cross-petition "—is confusing, if not meaningless. The cross-petition was not an amendment to the answer; as such, it would have no virtue. It was a separate proceeding and no order was required to institute it. What was required, and what was not made, was some order dispensing with all the other rules that would normally have to be complied with before the matter could be brought to trial. If the issue had been disposed of and judgment delivered, Order 70, r. 1, could, no doubt, have been invoked—I do not say with what success—to cure the irregularities involved. But the complaint

C. A.
1960
BLACKER v. BLACKER.

that is made here—namely, that the issue was not adjudicated—cannot be made successfully unless it is shown that the procedure prerequisite to adjudication has either been complied with or dispensed with. On that ground alone, and apart from rule 3 (2) I should be prepared to dismiss these appeals.

Appeals dismissed; no order as to costs.
Leave to appeal to the House of Lords.

Solicitors: *J. E. Baring & Co.; C. E. Maplestone.*

I. G. R. M.

1958
Oct. 7, 8, 9, 29.
Lord Merriman P. and Hewson J.
C. A.
1959
June 3, 4, 5, 9; *July* 30.
Hodson, Sellers and Harman L.JJ.

LILLEY *v.* LILLEY.

Husband and Wife—Maintenance—Justices—Wilful neglect to maintain—Wife living apart from husband on medical grounds—Forced separation — Effect on husband's liability to maintain — Whether neurotic wife justified in refusing to return—Summary Jurisdiction (Married Women) Act, 1895 (58 *&* 59 *Vict. c.* 39), *s.* 4.

The parties were married in 1948. In 1952 a child was born; the confinement was difficult, and thereafter the wife suffered from a mental or nervous disorder, and developed an invincible repugnance not only to marital intercourse but even to the company of her husband. She was for some time a voluntary inmate in a mental hospital, and for some time visited her husband occasionally in an unsuccessful attempt to get rehabilitated; she was at no time of unsound mind, but according to the medical evidence her condition was incurable and a resumption of cohabitation would endanger her health.

The husband, against whom a maintenance order had been made by a stipendiary magistrate in 1954 on the ground of desertion, made attempts at reconciliation which were rejected; the wife informed him by letter in 1957 of her unalterable decision never to return: thereupon the magistrate, on the husband's application, discharged the maintenance order. Thereafter for a time the husband made a voluntary allowance, which he later discontinued. The wife made a fresh application for maintenance which the magistrate dismissed on the grounds (1) that the husband had no legal liability to maintain the wife as he had not been guilty of any matrimonial offence; (2) that the wife was herself in desertion and therefore not entitled to maintenance. On appeal, the Divisional Court affirmed the order on the first ground while rejecting the second. On an appeal by the wife to the Court of Appeal:—

Held, dismissing the appeal, (1) that in proceedings between husband and wife, a husband could not be found guilty of wilful neglect to maintain unless he was a wrongdoer; such wrongdoing might consist of the very fact of failure to maintain.

Baker v. *Baker* [1950] W.N. 29; 66 T.L.R. (Pt. 1) 81 applied.

(2) That the obligation of a husband to maintain his wife was not affected by an enforced separation, so that unless the wife in the present case was herself in desertion the husband would have committed the offence charged, subject to consideration of the relative means of the parties.

Observations of Singleton L.J. in *Keeley* v. *Keeley* [1952] W.N. 496; [1952] 2 T.L.R. 756, 760 applied.

(3) That, notwithstanding the danger to the wife's health if she resumed cohabitation, as there was a de facto separation all that was needed to make the wife into a deserter was the intention to desert, which she had evinced by declaring her intention never to return: a rational but neurotic wife could not in law justify a refusal ever to return; accordingly, the wife was in desertion, and the husband was not liable to maintain her.

Observations of Greene M.R. in *Pardy* v. *Pardy* [1939] P. 288, 302; 55 T.L.R. 1037; [1939] 3 All E.R. 779; *Drew* v. *Drew* (1888) 13 P.D. 97; *Crowther* v. *Crowther* [1951] A.C. 723; [1951] 1 T.L.R. 1149; [1951] 1 All E.R. 1131; and *Leng* v. *Leng* (1946) 62 T.L.R. 722; [1946] 2 All E.R. 590 applied.

Decision of the Divisional Court affirmed in the result.

The parties were married on October 2, 1948. A child was born on March 13, 1952. The wife's confinement was a difficult one, and thereafter she suffered from a mental or nervous disorder which was either caused or gravely aggravated by the birth of the child, developing an invincible repugnance to sexual intercourse and even to the presence of her husband which was in no way attributable to wilfulness on her part. On October 2, 1952, she was admitted as a voluntary patient to a mental hospital. She made several unsuccessful attempts to rehabilitate herself by returning home for short periods, the parties occupying separate rooms without attempting sexual intercourse. In June, 1956, she left the hospital and went to live with her mother and the child.

On October 12, 1954, the wife was granted by the stipendiary magistrate for Kingston-upon-Hull a maintenance order of £2 per week with £1 for the child on the ground of her husband's desertion, the wife being given custody. After she had left the hospital the husband wrote on several occasions suggesting a reconciliation, but the wife in April, 1957, wrote stating that a return was impossible and that that was her final answer. On August 23, 1957, the magistrate discharged the maintenance

1958

LILLEY v. LILLEY.

order on the ground that the husband was not a deserter, but made an order under the Guardianship of Infants Acts giving the wife the custody of the child and ordering the husband to pay 30s. per week for its maintenance. For some time the husband continued to pay £3 per week, but on September 6, 1957, he ceased paying anything beyond the 30s. in respect of the child.

On January 4, 1958, the wife made a complaint to the magistrate of wilful neglect to maintain. Medical evidence was given that it might be disastrous to her mental health if she returned to her husband, even on a sexless basis. The magistrate dismissed the complaint on two grounds: (1) that the husband had no legal liability to maintain the wife because he had not been guilty of matrimonial misconduct; (2) that the wife was herself in desertion and therefore was not entitled to the order sought.

The wife appealed to the Divisional Court. The facts are more fully stated in the judgment of the Court of Appeal.

R. H. Hutchinson for the wife appellant. "The overriding "duty of a man is to maintain his wife. His duty only ceases "when she has been guilty of a grave fault, such as adultery or "desertion, by which she forfeits her right to maintenance": *per* Denning L.J. in *National Assistance Board* v. *Parkes*.[1] Although there is no wilful neglect to maintain if there has been a consensual separation either without any agreement for maintenance or under an agreement regularly complied with; once there is a change of circumstances, and the wife brings this to the husband's notice, as in *Tulip* v. *Tulip*,[2] and as this wife has done, then he becomes liable to maintain her. [Reference was made to *Read* v. *Legard*[3] and *Jones* v. *Guardians of Newtown and Llanidloes*.[4]] "A husband cannot in law wholly contract "out of his liability to maintain his wife": *per* Romer L.J. in *National Assistance Board* v. *Parkes*.[5] A fortiori a husband cannot contract out of his liability if his wife is unable for reasons of health to return to him. If wilful neglect to maintain imputes an element of misconduct, that misconduct exists when the husband refuses to provide maintenance to a wife whom he is, by the common law, liable to maintain, and it is unnecessary to

[1] [1955] 2 Q.B. 506, 517; [1955] 3 W.L.R. 347; [1955] 3 All E.R. 1.
[2] [1951] P. 378; [1951] 1 T.L.R. 1056; [1951] 2 All E.R. 91.
[3] (1851) 6 Ex. 636.
[4] [1920] 3 K.B. 381; 36 T.L.R. 758.
[5] [1955] 2 Q.B. 506, 525.

establish any further degree of misconduct. [*Papadopoulos* v. *Papadopulous*,[6] *Stringer* v. *Stringer*,[7] *Pinnick* v. *Pinnick*[8] and *W.* v. *W.* (*No. 2*)[9] were referred to.]

It is not suggested that the husband is in desertion. [He referred to *Leng* v. *Leng*.[10]] But the serious consequences to the mental health of the wife were she to return to her husband constitute a grave and weighty matter entitling her to remain apart. Notwithstanding, therefore, her refusal to accept her husband's requests that she should return, it cannot be said that she is in desertion either. The circumstances are similar to those in *Keeley* v. *Keeley*[11] and *Clark* v. *Clark*.[12] [He referred also to *Timmins* v. *Timmins*.[13]] In such a case, the wife being guiltless of any offence is entitled to be maintained by her husband under his common law obligations. The husband knew that his wife wanted maintenance, he deliberately stopped paying her, and he was therefore guilty of wilful neglect to maintain her. The Acts relating to wilful neglect to maintain do not impose any new obligation: they simply provide a statutory remedy in respect of a common law liability.

Pinnick v. *Pinnick*[14] and the authorities considered and applied therein, deal with cases where the parties have agreed to separate, and they are, therefore, to be distinguished. This is a case where the separation has been due to the wife's misfortune, and *Jones* v. *Guardians of Newtown and Llanidloes*[15] is decisive in her favour. Her position marks a middle way between desertion and consensual separation, and Hodson L.J.'s observations in *Price* v. *Price*[16] to the effect that the law did not recognise "a sort of undefined condition where parties are living apart in "conditions which may be described as drift" were not directed to a case of this nature. The authorities recognise in such a case a tertium quid. [He referred also to *Thomas* v. *Thomas*[17];

[6] [1930] P. 55, 68; 46 T.L.R. 44.
[7] [1952] P. 171; [1952] 1 T.L.R. 415; [1952] 1 All E.R. 373.
[8] [1957] 1 W.L.R. 644; [1957] 1 All E.R. 873.
[9] [1954] P. 486, 515; [1954] 3 W.L.R. 381; [1954] 2 All E.R. 829.
[10] (1946) 62 T.L.R. 722; [1946] 2 All E.R. 590.
[11] [1952] 2 T.L.R. 756; [1952] W.N. 496.
[12] [1956] 1 W.L.R. 345, 351; [1956] 1 All E.R. 823.
[13] [1953] 1 W.L.R. 757; [1953] 2 All E.R. 187.
[14] [1957] 1 W.L.R. 644.
[15] [1920] 3 K.B. 381.
[16] [1951] P. 413, 421; [1951] 2 All E.R. 580n.
[17] 62 T.L.R. 166; [1946] 1 All E.R. 170.

1958

LILLEY v. LILLEY.

Everitt v. *Everitt* [18]; *Whittaker* v. *Whittaker* [19]; *Morton* v. *Morton* [20]; *Dyson* v. *Dyson* [21]; *Snowdon* v. *Snowdon.* [22]]

Keith McHale for the husband respondent. A husband's common law duty to maintain a wife who has not committed (as in *National Assistance Board* v. *Wilkinson* [23]) a matrimonial offence may have been enforceable by the guardians or, today, by the National Assistance Board, or by tradesmen in an action for necessaries, but it is not enforceable by the wife herself unless that right has been given to her by statute. "At common law a "wife never had a right to ask for a sum of money, and if her "husband did not support her, she had no right of action against him. . . . The most that she could do was to pledge the husband's "credit": *per* Lord Goddard C.J. in *Stopher* v. *National Assistance Board, National Assistance Board* v. *Parkes.* [24] It was to remedy that position, as Lord Goddard C.J. pointed out, that the legislature stepped in to provide her with a remedy under the Summary Jurisdiction (Separation and Maintenance) Acts. *Read* v. *Legard* [25] does no more than decide that a husband's liability for necessaries supplied to his wife continues during the period of his insanity. *Jones* v. *Guardians of Newtown and Llanidloes,* [26] while emphasising a husband's common law duty, concerns the right of the guardians to enforce it; it does not decide that the wife herself may apply for maintenance in the absence of some special statutory provision. Any obligation in this case is confined to the common law. [Reference was made to the exposition of the duties of a husband to maintain his wife by Lord Merrivale P. in *Dewe* v. *Dewe, Snowdon* v. *Snowdon.* [27]]

"A wife has no right to separate maintenance in a different "home unless she can justify the fact that she is living apart "from her husband": *per* Hodson L.J. in *Price* v. *Price* [28]; and it is submitted that it was to this aspect that Hill J. was referring in *Papadopoulus* v. *Papadopoulos* [29] when he said that prima facie a husband's duty is to maintain his wife. There may be a separation due to necessity, such as the husband's calling,

[18] [1949] P. 374; [1949] 1 All E.R. 908.
[19] [1939] W.N. 332; 55 T.L.R. 1070; [1939] 3 All E.R. 833.
[20] [1954] 1 W.L.R. 737; [1954] 2 All E.R. 248.
[21] [1954] P. 198; [1953] 3 W.L.R. 1141; [1953] 2 All E.R. 1511.
[22] [1928] P. 113; 44 T.L.R. 274.
[23] [1952] 2 Q.B. 648; [1952] 2 T.L.R. 11; [1952] 2 All E.R. 255.
[24] [1955] 1 Q.B. 486, 496; [1955] 2 W.L.R. 622; [1955] 1 All E.R. 700.
[25] 6 Ex. 636.
[26] [1920] 3 K.B. 381.
[27] [1928] P. 113, 119.
[28] [1951] P. 413, 421.
[29] [1930] P. 55, 68.

when the duty to maintain continues: *W.* v. *W.* (*No. 2*)[30]; but the wife cannot in this case properly justify the fact that she is living apart from her husband. It is clear from the judgments of Somervell and Hodson L.JJ. in *Price* v. *Price*,[31] that there is no "middle way," and the wife's attitude here has been not that she cannot, but that she will not, go back.

In *Keeley* v. *Keeley*[32] the question was considered of a wife who might be detained in hospital for further treatment with a view to recovery, leaving open the possibility of her returning home later, but the respondent was in fact held to have decided never to return; while *Clark* v. *Clark*[33] is to be distinguished, for the husband here cannot be said to have consented to the wife remaining apart, since he asked her to return. In *Timmins* v. *Timmins*[34] the decree of restitution was refused because the husband's conduct, while not amounting to cruelty, had been the cause of the injury to the wife's health. The "just cause" which negatives desertion must be something that moves from the party to whom the other will not return.

This husband has made a bona fide offer to have his wife back, and there is nothing in his conduct to justify her refusal, as in the earlier case of *Thomas* v. *Thomas*.[35] But it has been categorically rejected by a wife who has retained her volition, and she must, accordingly, be held to be in desertion: *Thomas* v. *Thomas*[36]; *Everitt* v. *Everitt*.[37] But even if it be held that she was entitled because of her health to refuse this offer, the husband, having committed no offence, has not been guilty of wilful neglect to maintain her. Her remedy as to maintenance is to apply to the National Assistance Board.

R. M. Hutchinson replied.

Cur. adv. vult.

LORD MERRIMAN P. stated the facts leading up to the discharge of the wife's order on August 23, 1957, and continued: The husband's complaint that the order should be discharged on the ground that he had offered to resume cohabitation and the wife had refused, was heard on August 23, 1957. The magistrate, treating the desertion as simple and the offers as genuine and sufficient to terminate the desertion, discharged the order. It is unnecessary to consider whether the first three letters,

[30] [1954] P. 486, 515.
[31] [1951] P. 413.
[32] [1952] 2 T.L.R. 756.
[33] [1956] 1 W.L.R. 345.
[34] [1953] 1 W.L.R. 757.
[35] [1924] P. 194; 40 T.L.R. 250.
[36] 62 T.L.R. 166.
[37] [1949] P. 374.

1958

LILLEY v. LILLEY.

Lord Merriman P.

founded as they were on the assumption that the wife was completely recovered, were adequate in view of the way in which the husband had brought the cohabitation to an end. The letter of April 17, 1957, was more realistic and penitent in tone and was held to be genuine. Not only was there no appeal against the magistrate's decision to discharge the order, but the trial of the wife's present complaint was conducted below, and on this appeal, on the basis of an unqualified admission that the magistrate's decision of that case was unexceptionable. Accordingly, the wife's complaint, on the cessation of any maintenance for her after September 6, 1957, of wilful neglect to provide reasonable maintenance must be dealt with on the footing that it is accepted that the husband had put an end to the state of desertion created by his letter of August 2, 1954. Further, it was naturally conceded that if the husband, by the discharge of the order of August 23, 1957, had ceased to be a deserter, and the wife's persistent refusal to resume cohabitation created a situation in which she herself became the deserter, there would be an end of her case. Conceding that the husband had ceased to be a deserter, the wife's case is that she has been and still is prevented by the state of neurosis from which she suffers in relation to life with her husband, and that this is a grave and weighty reason justifying her in not resuming cohabitation, even though it does not emanate from any misconduct on the part of the husband; that if she is not a deserter (there being no question of adultery) the husband is liable to maintain her by the common law of England, and therefore his deliberate refusal to do so amounts to wilful neglect.

It must be recognised, I think, that the stipendiary magistrate has actually held the wife to be "in desertion." In the last part of his judgment the magistrate said that he considered that the second and third points made by the husband's solicitor must prevail. These points were: (second) that the husband had no legal liability to maintain his wife because he was not guilty of any matrimonial misconduct, and (third) that this wife is herself now in desertion, and therefore not entitled to the order sought at all.

He added that these points are not necessarily corollaries, and that even though it be assumed that the wife was not in desertion, the husband had not, in his view, wilfully neglected to maintain her.

I do not think, particularly having regard to other observations, that the finding of desertion by the wife is really qualified

1958

LILLEY v. LILLEY.

Lord Merriman P.

by the final observations. If so, there is no more to be said, so long as that state of things continues. But I doubt whether it is right to hold that the wife is a deserter.

The stipendiary magistrate stated that he assumes, on the part of the wife, a physical capacity to resume cohabitation and a mental capacity to make a rational decision and to form an intention to desert. Having regard, however, to the medical evidence already mentioned, the antithesis between physical and mental capacity seems to me to be of doubtful validity.

The wife's assumed capacity to make a rational decision is based upon Dr. Hendy's answer to the question already quoted, which itself contains the words " except so far as it relates to her " husband," in assenting to which Dr. Hendy said " and to other " men." In the course of the argument we intimated that we were not convinced that a woman suffering from an illness causing the reaction to the mere presence of her husband, or anyone of the male sex, as described by Dr. Hendy, without any question of wilfulness about it, could properly be assumed to be capable of making a rational decision to return to cohabitation or to desert. I am still of that opinion. I think that the stipendiary magistrate was wrong in rejecting the guidance of the Court of Appeal in *Keeley* v. *Keeley*,[1] on the grounds that the wife is no longer in hospital. In my opinion the undisputed medical evidence establishes that, although no longer in hospital, she was just as incapable of resuming cohabitation, whether one describes the incapacity as physical or mental, as the wife in *Keeley* v. *Keeley* [1] would have been held to be if the issue had been properly raised.

For these reasons I do not agree with the stipendiary magistrate that all the elements necessary to constitute desertion were present.

What, then, is the result? Mr. Hutchinson, in final analysis, founded the wife's case on *Keeley* v. *Keeley*,[1] and in particular this passage in Singleton L.J.'s judgment[2]: " If the respondent " is stricken by illness which compels him or her to be in hospital " for the relevant period, it is difficult to see that the petitioner " can prove desertion without cause, and it seems to me that this " reasoning would apply equally in the case of mental illness as " it would in the case of (say) prolonged heart disease. In either " case it should be pleaded and argued." He also relied on the statement of the common law in *Jones* v. *Guardians of Newtown*

[1] [1952] 2 T.L.R. 756.

[2] [1952] 2 T.L.R. 756, 761.

1958

LILLEY v. LILLEY.

Lord Merriman P.

and Llanidloes,[3] *per* Lord Reading[4] and Shearman J.,[5] *Tulip* v. *Tulip*[6] and *National Assistance Board* v. *Parkes*,[7] and particularly on the judgment of Denning L.J.[8] in the Court of Appeal.

In a very forcible argument, therefore, he submitted that, the wife not being in desertion, though living apart, and there being no question of adultery, the husband is liable to maintain her at common law, and that he has not done so since he deliberately stopped what was described as the voluntary allowance of 30s.; and therefore he is guilty of wilful neglect to provide reasonable maintenance within section 4 of the Summary Jurisdiction (Married Women) Act, 1895.

As to *Jones* v. *Guardians of Newtown and Llanidloes*,[9] it is to be observed that the decision is that the guardians could recover from the husband the cost of the wife's keep incurred by them, thus being in line with the National Assistance Board cases to which I will refer; and to do so on the ground that the wife, a deserter of long standing, had ceased to be so on becoming a pauper lunatic chargeable to the guardians.

It is right to point out, without detracting at all from the validity of the exposition of the common law, which has frequently been followed with approval, that the last ground of the decision did not receive unqualified approval in the House of Lords in *Crowther* v. *Crowther*.[10]

As to *National Assistance Board* v. *Parkes*,[11] and the judgment of Denning L.J. in the Court of Appeal, Collingwood J. and I, sitting in this court, reviewed the whole question in *Pinnick* v. *Pinnick*.[12] I consider that I am bound by that judgment. Even if I am not so, I adhere to it, not less so because it attracted favourable comment in the Law Quarterly Review for October, 1957 (Vol. 73, pp. 453–455).

I do not propose to repeat our reasons now. Suffice it to say we pointed out[13] that in the Divisional Court in *National Assistance Board* v. *Parkes*,[14] Lord Goddard C.J., having explained the practical meaning of a husband's liability at common law, recognized the validity of *Baker* v. *Baker*[15] and the

[3] [1920] 3 K.B. 381.
[4] [1920] 3 K.B. 381, 383–385.
[5] Ibid. 385, 386.
[6] [1951] P. 378.
[7] [1955] 2 Q.B. 506.
[8] [1955] 2 Q.B. 506, 517.
[9] [1920] 3 K.B. 381.
[10] [1951] A.C. 723, 732; [1951] 1 T.L.R. 1149; [1951] 1 All E.R. 1131.
[11] [1955] 2 Q.B. 506.
[12] [1957] 1 W.L.R. 644.
[13] [1957] 1 W.L.R. 644, 652–653.
[14] [1955] 1 Q.B. 486, 498–499.
[15] [1950] W.N. 29; 66 T.L.R. (Pt. 1) 81.

cases in which it has been followed, and pointed out the distinction between decisions under the Summary Jurisdiction (Separation and Maintenance) Acts and claims brought by the National Assistance Board under sections 42 and 43 of the National Assistance Act, 1948; we also doubted [16] whether a case of the latter class was the appropriate occasion for overruling what appeared to be settled law in the former class, especially as judgments of the Court of Appeal were involved; and whether reasoning based on a minority view expressed by Denning L.J. in *Price* v. *Price* [17] was sound. We also expressed the opinion that there was no necessary conflict between *Tulip* v. *Tulip* [18] and *Baker* v. *Baker*,[19] and similar cases down to *Price* v. *Price* [20]— in effect because the latter group dealt with the question of the entitlement of a separated wife to maintenance, whereas *Tulip* v. *Tulip* [18] dealt with the reasonableness of the amount in the case of an agreed separation.

In this case there was plainly no agreement, either that the wife should live apart or that she should be maintained as a separated wife. The husband is admitted not to be in desertion, and I am assuming that the wife also is not so. The wife only attempts to justify her refusal to cohabit on a ground which involves "no matter of complaint against her husband" (see Halsbury, Laws of England, 3rd ed., Vol. 12, p. 482, para. 1077).

In my opinion, we should not be justified in abandoning the principles laid down by this court in *Baker* v. *Baker*,[21] *Stringer* v. *Stringer*,[22] *Starkie* v. *Starkie* (*No.* 2),[23] and other cases, or by the Court of Appeal in *Chapman* v. *Chapman*,[24] and by the majority of the Court of Appeal in *Price* v. *Price*,[25] in which case Hodson L.J. said [26]: "The question of the wife's right to maintenance may depend on whether she is a deserter, or whether she is deserted, or whether there is a contract between them. I do not think that the law recognises a sort of undefined condition where parties are living apart in conditions which may be described as of drift; or in some not very clearly defined condition in so far as rights to maintenance are concerned." Nor do I think that we ought to ignore the line of decisions in this

[16] [1957] 1 W.L.R. 644, 655.
[17] [1951] P. 413.
[18] [1951] P. 378.
[19] 66 T.L.R. (Pt. 1) 81.
[20] [1951] P. 413.
[21] 66 T.L.R. (Pt. 1) 81.
[22] [1952] P. 171.
[23] [1954] 1 W.L.R. 98.
[24] Unreported, April 4, 1951 (extracts from the judgments are cited in *Stringer* v. *Stringer* [1952] P. 171, 179–180).
[25] [1951] P. 413.
[26] Ibid. 421.

1958

LILLEY v. LILLEY.

Lord Merriman P.

court that wilful neglect to provide reasonable maintenance involves an element of misconduct—and to do so both on the strength of a dictum that the wife is entitled to maintenance because she is a wife, and that *Baker* v. *Baker* and the other cases I have mentioned are overridden. The cases of *National Assistance Board* v. *Wilkinson*[27] and *National Assistance Board* v. *Parkes*[28] decide that if the wife is a deserter the husband cannot be made to contribute to any public assistance given to the wife, but that if she is not in desertion, and there is no question of adultery, the National Assistance Board have an independent right against the husband under sections 42 and 43 of the National Assistance Act, 1948. It is true that under subsection (5) (*b*) of section 43 the National Assistance Board can obtain an order to pay the money to the wife, but this, I emphasise, is an order made by virtue of the express liability of the husband to maintain his wife under section 42, and does not necessarily impute a finding of wilful neglect.

In my opinion that is the true solution of this difficult case. But I do not think that in the circumstances the husband can be found guilty of wilful neglect to provide reasonable maintenance.

I therefore agree with the stipendiary magistrate's conclusion, although I differ from some of his reasons. Accordingly the appeal will be dismissed.

HEWSON J. I agree with my Lord, and would add that in my view the stipendiary magistrate was right in holding, on August 23, 1957, that the husband was no longer in desertion of his wife. I cannot accept, however, that the wife became a deserter through her refusal to return under the matrimonial roof. She, through her acute state of neurosis, over which she had no control, was quite unable to return to cohabitation with her husband. The uncontradicted medical evidence of Dr. Hendy, which must be looked at as a whole, establishes in my mind that while she was capable of exercising free and reasoned thought in other matters she was quite incapable of such exercise in relation to being under the same roof as her husband, or, indeed, any other man. Dr. Hendy described her case as exceptional, and was of the opinion that a return to her husband would be disastrous to her mental health. As I have said, for my part I cannot, in these extreme circumstances, regard her as a deserter.

If I am right, then we are left with the situation that neither

[27] [1952] 2 Q.B. 648.

[28] [1955] 2 Q.B. 506.

party is in desertion of the other. Neither party has a legitimate ground of complaint against the other and I cannot see that the husband can be found guilty of wilful neglect to provide reasonable maintenance for his wife, for, on the evidence, I see no element of misconduct in his attitude. It may be that the answer to this difficult case lies in sections 42 and 43 of the National Assistance Act, 1948, but having in mind, and agreeing with, what the learned President has said, I think that this appeal should be dismissed.

1958

LILLEY v. LILLEY.

Hewson J.

J. B. G.

The wife appealed.

Rudolph Lyons Q.C. and *R. H. Hutchinson* for the wife. The Divisional Court have held that the wife is not in desertion, but that, nevertheless, the husband is not bound to maintain her as he has not been guilty of any matrimonial offence. In the vast majority of cases when spouses are apart the separation is consensual or one party is in desertion; in the present case there is no consent, and neither party is in desertion or guilty of a matrimonial offence. The view that a wife's right to maintenance when living apart is conditional on the commission by the husband of some matrimonial offence other than the failure to maintain is a misreading of the language of section 4 of the Summary Jurisdiction (Married Women) Act, 1895.

C. A.

1959

LILLEY v. LILLEY.

[HODSON L.J. Is it right for the wife to decide, as a rational being, that she will live apart, and then claim money payments, when she is entitled to live under the husband's roof and be maintained there?]

A person may be rational on every subject but one; here the evidence was that if she returned to her husband she would become insane.

[SELLERS L.J. It would be very hard on her if she were disentitled when not taking a step to make herself insane, while if she took that step and became insane she would be entitled.]

A somewhat similar case is *Timmins* v. *Timmins* [1]; there the husband, whose conduct, though falling short of legal cruelty, was such that if his wife returned to him she would suffer a breakdown, was refused a decree of restitution of conjugal rights. *Scott* v. *Scott* [2] shows what is reasonable maintenance, having

[1] [1953] 1 W.L.R. 757; [1953] 1 All E.R. 187.

[2] [1951] P. 245; [1951] 1 All E.R. 216.

C. A.
1959
LILLEY
v.
LILLEY.

regard to the standard of life of the parties. *Keeley* v. *Keeley* [3] shows that the medical evidence to justify a conclusion of non-desertion must be very strong, but it was very strong in the present case. The Divisional Court was right in holding that she was not in desertion; her decision was not to desert, but to avoid insanity. *Jones* v. *Guardians of Newtown and Llanidloes* [4] shows that at common law the husband is bound to support a wife who is not in desertion, notwithstanding that he himself is not guilty of any matrimonial misconduct: see also *Papadopoulos* v. *Papadopoulos* [5] and *Read* v. *Legard* [6]; while *Tulip* v. *Tulip* [7] shows that it is not necessary to prove any matrimonial offence other than the failure to maintain.

Under the provisions of the National Assistance Act, 1948, a husband is bound to maintain his wife under circumstances in which they are parted by consent, and he is in no way to blame; see *Stopher* v. *National Assistance Board.*[8] Under that Act the liability is enforceable by the National Assistance Board, not by the wife, and exists unless the wife is guilty of desertion or adultery.

[HODSON L.J. In *Russell* v. *Russell* [9] it was said to be contrary to justice to hold as a deserter a man who refused to live with a wife who made the most horrible charges against him.]

A similar case is *Dyson* v. *Dyson.*[10]

The Divisional Court was right in holding that the wife was not a deserter. In *Leng* v. *Leng* [11] it was held that the neurotic condition of a husband was not sufficient to justify the refusal of his wife to live with him, so that he was not guilty of constructive desertion.

When there is no matrimonial offence on either side, the rule of common law must prevail; the husband must provide maintenance. If a spouse is neurotic and disagreeable, that is a risk which the other spouse will have to take; but here the circumstances are far more grave and involve a danger, or almost certainty, of insanity if cohabitation is resumed. Cohabitation is impossible for all practical purposes, and that distinguishes this

[3] [1952] W.N. 496; [1952] 2 T.L.R. 756.
[4] [1920] 3 K.B. 381; 36 T.L.R. 758.
[5] [1930] P. 55; 46 T.L.R. 44.
[6] (1851) 6 Ex. 636.
[7] [1951] P. 378; [1951] 1 T.L.R. 1056; [1951] 2 All E.R. 91.
[8] [1955] 1 Q.B. 486; [1955] 2 W.L.R. 622; [1955] 1 All E.R. 700.
[9] [1897] A.C. 395; 13 T.L.R. 516.
[10] [1954] P. 198; [1953] 3 W.L.R. 1141; [1953] 2 All E.R. 1511.
[11] (1946) 62 T.L.R. 722; [1946] 2 All E.R. 590.

case from *Leng* v. *Leng*.[12] On the facts as accepted below it is impossible to hold that this wife is a deserter.

Hutchinson following. In *Leng* v. *Leng*[12] the issue was different; that case is only concerned with the question whether a husband who was neurotic and unpleasant could be a constructive deserter; here neither party is in desertion.

Walter Raeburn Q.C. and *Keith McHale* for the husband. On the finding of the stipendiary the wife was capable of forming a rational decision and of forming an intention to desert. In seeing whether there is an animus deserendi, the motive is irrelevant; the wife said that she would never live with the husband again, and that is enough to constitute desertion when the husband ceased to be a deserter himself. A spouse can obtain a divorce from an insane spouse after a time; the wife's claim here is to live apart forever without affording the husband such a remedy. *Thomas* v. *Thomas*[13] shows that where a deserting spouse offers to return and is refused, the other spouse becomes a deserter. The wife must, accordingly, justify her continued separation, and her excuse of neurosis is insufficient: *Leng* v. *Leng*.[14] An earlier case of *Thomas* v. *Thomas*[15] shows that the question whether a spouse has reasonable cause for refusing to return depends on legal and not medical considerations. *Russell* v. *Russell*[16] shows that the court must look at the reality of the case, and the reality here is that the wife, when invited to come home, refused to do so, and said that she never would do so. There are, of course, separations of necessity in fact, which are not so in law; e.g., when the husband is away travelling on business, or in hospital, or at sea; in such cases the spouses do not consider themselves as separated, even though the time of return may be indefinite. So might it have been in this case if the wife had said that at some future date she might return; that would have been a separation of necessity, which implies an animus revertendi. But she has stated categorically that she never will return, and that is desertion.

The decision of the Divisional Court that "wilful neglect" in the Act of 1895 involves some misconduct apart from the failure to maintain, was correct; to obtain a remedy a wife must prove two things, first, guilt of some kind, and secondly, neglect, and she must show that these two things caused the separation.

[12] 62 T.L.R. 722.
[13] (1946) 62 T.L.R. 166; [1946] 1 All E.R. 170.
[14] 62 T.L.R. 722.
[15] [1924] P. 194.
[16] [1897] A.C. 395.

C. A.
1959
LILLEY
v.
LILLEY.

At common law the husband owed a duty to the public to see that the wife, who had been stripped of her property, was not thrown on the public. When the Married Women's Property Acts were enacted, the duty of the husband was modified, and Parliament gave the wife a remedy, because it was a convenient way of short-circuiting the duty owed to the public. The National Assistance Act, 1948, gave new rights to the public by making the spouses liable to maintain each other. At the bottom of this legislation is the question of public rights. The wife is given power in a magistrates' court to enforce her common law rights. Even when a wife pursues her statutory remedy, she enforces the common law duty of the husband. The conduct of the husband was always at law material on the nature of his duty.

The difficulty here is that there are two co-existing motives. The wife says that she cannot come home, and would not come home if she could. Assuming that this is not desertion, it is an unusual situation. Instead of there being here a good wife who wants to go home, there is a good husband who says there is a home here for his wife, and who is prepared to perform his public duty as regards bed and board. But the one thing that he will not do is to encourage his wife to live elsewhere by maintaining her. It cannot be said that his attitude involves guilt in the sense of neglect of duty. Today the wife is also under a duty to support her husband. Formerly it was a one-sided affair—the husband only had to support the wife—because of concern for the public, not of fondness for the spouse. But a husband not in fault cannot be obliged to maintain his wife if she withdraws from the marital relationship.

In *Jackson* v. *Jackson* [17] a wife summoned her husband for wilful neglect. The husband required the matrimonial home to be next door to his mother and he insisted on control of the housekeeping purse. It was held that the wife had not made out her complaint, and the magistrates' order for maintenance was discharged. The basis of the decision was that the husband's conditions could not be considered unreasonable. In *Millichamp* v. *Millichamp*,[18] a very similar case, the husband required the wife to live in his mother's house. It was held that this was an unreasonable demand, and that the wife was justified in leaving. *Jackson's* case [19] shows that the wife must have a completely good cause for leaving. Though the point in *Morton* v. *Morton* [20]

[17] (1932) 48 T.L.R. 206.
[18] (1931) 146 L.T. 96.
[19] (1932) 48 T.L.R. 206.
[20] (1942) 58 T.L.R. 158; [1942] 1 All E.R. 273.

concerned the compromise of maintenance proceedings and their effect as a binding contract, reference was made to the point now under consideration. Since the terms of the agreement were carried out, it was held that there was no wilful neglect: see, too, *Jones* v. *Jones* [21] and *Whittaker* v. *Whittaker* [22] as to what wilful neglect means.

Baker v. *Baker* [23] was a case of a consensual parting. The Divisional Court held that there could be no wilful neglect on the part of the husband to maintain unless he agreed to maintain his wife; it was said that the justices' decision granting maintenance seemed to have ignored the vital principle, that, unless some grave and weighty matter justified a wife in leaving home, she was not entitled to maintenance save in the exceptional case of a consensual separation with an agreement attached to it that the husband would maintain her. "Grave and weighty matter," it is submitted, relates to the conduct of the husband, not to some extraneous matter. The note in Law Quarterly Review (1957), vol. 73, p. 453, about *Price* v. *Price*,[24] is adopted as part of the husband's argument in the present case.

The most recent case, *Pinnick* v. *Pinnick*,[25] involved a mutual parting. It was held that, since there was a mutual separation, there was no wilful neglect. [Reference was also made to *Starkie* v. *Starkie* (*No. 2*) [26] and *Morton* v. *Morton* (*No. 2*).[27]] In *Keeley* v. *Keeley* [28] a wife who said that she was quite happy to remain in an institution was held to be in desertion. In the present case the evidence is that the wife consciously and deliberately formed the intention never to return, and it is not clear that it would be wholly impossible at any conceivable future time for her to return to her husband on a non-sexual basis.

McHale following. At common law the husband's duty to maintain his wife was one of imperfect obligation; she had no power to take him to court; even after the Act of 1895 she could only get £2 per week. The National Assistance Act, 1948, aims to protect society in cases where neither party is guilty of a matrimonial offence. *National Assistance Board* v. *Parkes* [29]

[21] [1924] P. 203; 46 T.L.R. 33.
[22] [1939] W.N. 332; 55 T.L.R. 1070; [1939] 3 All E.R. 833.
[23] [1950] W.N. 29; 66 T.L.R. (Pt. 1) 81.
[24] [1951] P. 413; [1951] 2 All E.R. 580n.
[25] [1957] 1 W.L.R. 644; [1957] 1 All E.R. 873.
[26] [1954] 1 W.L.R. 98; [1953] 2 All E.R. 1519.
[27] [1954] 1 W.L.R. 737; [1954] 2 All E.R. 248.
[28] [1952] W.N. 496; [1952] 2 T.L.R. 756.
[29] [1955] 2 Q.B. 506; [1955] 3 W.L.R. 347; [1955] 1 All E.R. 1.

C. A.
1959
LILLEY
v.
LILLEY.

shows that the wife, if not in desertion, could obtain relief from the board, who could claim against the husband. Here, as she is in desertion, neither she nor the board have any claim against him.

Lyons Q.C. replied.

Cur. adv. vult.

1959. July 30. HODSON L.J. The judgment which I am about to read is the judgment of the court.

This is an appeal from a decision of the Divisional Court of the Probate, Divorce and Admiralty Division dismissing an appeal from the stipendiary magistrate of Kingston-upon-Hull, who had dismissed a summons taken out by the appellant, the wife of the respondent, alleging that he had been guilty of wilful neglect to maintain her. The summons now before this court was issued on January 4, 1958, and was determined by the magistrate on February 26, 1958, when he dismissed it on two grounds: (1) that the husband had no legal liability to maintain the wife because he had not been guilty of matrimonial misconduct; (2) that the wife is herself in desertion and therefore not entitled to the order sought. The Divisional Court affirmed the decision on the first ground while rejecting the second.

The argument for the wife before us has been that if, as the Divisional Court has found, she is not in desertion of her husband, and there is no allegation of adultery against her and no agreement to live apart without the support of her husband, he is obliged to maintain her although she cannot live under his roof and has expressed her fixed intention not to do so. The husband, on the other hand, has argued—and this is his main contention—that the magistrate was right in holding that the wife was in desertion, and that for this reason his obligation to maintain his wife is suspended, and he cannot during that suspension be held guilty of wilful neglect to maintain her. In the alternative, he has sought to support the decision of the Divisional Court that even if she is not in desertion he is not liable to maintain her in the circumstances of this case because he is not guilty of wilful neglect.

The magistrate had had the parties before him on two earlier occasions. First, on October 12, 1954, he had made an order in the wife's favour on her application, on the ground of the husband's desertion, together with an order for the custody of the child of the marriage. Secondly, on August 23, 1957, on the husband's application, he discharged the order of 1954, and at

the same time made an order under the Guardianship of Infants Acts giving the wife the custody of the child and an order for the child's maintenance at the rate of 30s. a week. Nevertheless, for a time, the husband continued voluntarily to pay the wife maintenance for herself as well as the child at the rate of the previous order; but on September 6, 1957, he ceased to pay anything over and above the amount of the order of 1957 made in respect of the child, and eventually, the husband having discontinued his voluntary allowance, this summons was issued.

The wife was at the time of the hearing of the summons (in February, 1958) living with her mother and had been earning by part-time work as a secretary £3 10s. to £4 10s. a week since September or October, 1957. The magistrate found that she was receiving a salary of £4 10s. a week at the time of the hearing. No evidence was given as to the husband's means, and it is not clear that an order for maintenance would in the circumstances existing have been made, for the husband elected to call no evidence and to stand on his submission that whatever his means might be no order could be made since he was not guilty of the offence with which he was charged. The case has, however, been argued on the footing that the wife is or may be, having regard to the respective means of the parties, entitled to an order for her maintenance if she can prove that her husband has, in the words of the Summary Jurisdiction Act, 1895, been guilty of wilful neglect to maintain.

The parties were married on October 2, 1948, and on March 13, 1952, a child was born. The confinement was a difficult one, and thereafter the wife suffered from some mental or nervous disorder either caused or aggravated by the birth of the child. In particular she developed an invincible repugnance to sexual intercourse. She had no sexual intercourse with her husband after February, 1952—that is, before the birth of the child. On October 2, 1952, her condition was such that she was admitted as a voluntary patient to a mental hospital, the Delopole Hospital at Hull, where Dr. Hendy, who was called as a witness in the case, was the assistant psychiatrist and had the wife under his care. She left the hospital in August, 1953, and returned home to her husband, but had to return to hospital on September 15, 1953, where she remained, subject to short absences, until June, 1956, when she went to live with her mother and the child. Thereafter she visited the hospital regularly as an out-patient and was seen by Dr. Hendy every two or three weeks.

C. A. 1959

LILLEY v. LILLEY.

Between April, 1954, and the week-end of June 24–25, 1954, in an attempt to get herself rehabilitated, the wife went home for week-ends on the footing that she and her husband occupied separate bedrooms and that there would be no sexual intercourse. When the wife left the last time it was expected that she would return, but she did not do so, and in July, 1954, Dr. Hendy told the husband that in his opinion the wife's condition was incurable.

The husband then consulted solicitors, and on their advice wrote a letter dated August 2, 1954, to the wife threatening proceedings for divorce, upon which the magistrate found him to be in desertion and made the order of October 12, 1954, already referred to. The next year there was a meeting between the parties with a view to reconciliation, after which the wife wrote to the husband a letter dated September 8, 1955, in the following terms: "After seeing you and knowing how things stand between "us, I have to say that there is no chance of a reconciliation "between us. We are legally separated and under the court "order you are allowed to see Margaret, and I shall not stop you "from doing so. You know why this has happened and I ask "you not to judge me too harshly. I am sorry to have caused "you any unhappiness but remember I have suffered too."

After the wife left hospital in June, 1956, the husband made further efforts at reconciliation in the hope and belief that the wife had recovered, but his letters were not answered. On April 1, 1957, the husband wrote to the wife again on the assumption that she had recovered. Her reply, dated April 3, 1957, was as follows: "I received your letter yesterday. There was no "need to send me a registered letter because I receive *all* mail "sent to me. As regards my mother being unco-operative, that "is because I told her not to answer questions asked about me. "I object to people wanting to know where and what I am doing. "I have my own life to live and I don't go around asking ques-"tions about you. Many are times I have heard you questioning "Margaret, would you please refrain from doing it. Margaret is "only a child and she does not understand what is going on. You "know how I feel about coming back to you. I wrote you and "gave you a definite answer when I last saw you at the hospital. "My answer is still the same. You know the reasons why. "From a medical point of view it is impossible. If you doubt my "word you need only ask Dr. Hendy and he will confirm this. "Even though I am out of hospital the reasons are still the same "and always will be. Please do not bring Margaret into our "differences. She is very happy. I am devoted to her and she

" loves me and her life is a normal, healthy, happy one. If I " have to starve she will not want. I am sorry to hear you are " not well and hope you will soon recover. Please accept this as " a final answer." The husband replied on April 17 by a letter asking her to reconsider her refusal and making it plain that if she returned she could come back on the same conditions as before, meaning thereby that there would be separate bedrooms and no sexual intercourse.

The wife did not accede to this request, and accordingly the order of October 12, 1954, was discharged on August 23, 1957, on the ground that the husband had ceased to be in desertion. The wife has never appealed against this order, and when she issued her present complaint conceded, and still concedes, that the husband is no longer in a state of desertion.

If the wife is in desertion that is the end of the matter; but since both questions to which we have referred have been fully argued it is right to express an opinion on them. The first question depends on the effect of the Summary Jurisdiction (Married Women) Act, 1895, which provides a remedy in the courts of summary jurisdiction for wives whose husbands have wrongfully failed to maintain them. Formerly a wife had no direct remedy in the common law courts, although she could, if she were able to do so, pledge her husband's credit for the necessaries of life. Since the passing of the Matrimonial Causes Act, 1884, a wife has been able to obtain periodical payments in cases where her husband has disobeyed orders for restitution of conjugal rights. The existing statutory duty was stated in the Summary Jurisdiction (Married Women) Act, 1895, as follows: By section 4: " Any married woman . . . whose husband shall have been " guilty of . . . wilful neglect to provide reasonable maintenance for her or her infant children whom he is legally liable " to maintain, and shall by such . . . neglect have caused " her to leave and live separately and apart may apply to " any court of summary jurisdiction for an order under this " Act." By section 5: " The court of summary jurisdiction to " which any application under this Act is made may make an " order or orders containing all or any of the provisions following, " videlicet . . . (*c*) A provision that the husband shall pay to the " applicant personally, or for her use, to any officer of the court " or third person on her behalf, such weekly sum not exceeding " two pounds as the court shall, having regard to the means both " of the husband and wife, consider reasonable." By section 7: " A court of summary jurisdiction . . . may, on the application

C. A.
1959
LILLEY
v.
LILLEY.

" of the married woman or her husband, . . . from time to time " increase or diminish the amount of any weekly payment ordered " to be made. . . . If any married woman upon whose application " an order shall have been made . . . shall voluntarily resume " cohabitation with her husband, or shall commit an act of adul- " tery, such order shall upon proof thereof be discharged."

There can be no doubt that this was intended to give a remedy in support of the wife's common law right to maintenance at the hands of her husband. The common law right was not a right to an allowance but to be supported by being given bed and board, and under the statute a wife could not complain of wilful neglect to maintain because the husband was foolish enough to take the housekeeping out of her hands any more than she could have done at common law. (See *Jackson* v. *Jackson*.[1]) The remedy for wilful neglect to maintain was at first available only when such neglect in the joint home had driven the wife to leave the husband. This was remedied by an amendment of the statute in 1925 in order to deal with the case where the wife had nowhere to go and needed immediate relief: see section 1 of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, which also, by section 2 (2), provided that if she went back and lived with her husband the separate allowance ceased to be payable as from the date of resumption of cohabitation.

The offence charged is that as between husband and wife there has been a dereliction of that duty of maintenance, and questions have often arisen as to the circumstances in which the husband may be properly found guilty of the offence, which is in itself a form of matrimonial misconduct. In most cases where the spouses are living apart from one another the question of whether there has been wilful neglect to maintain the wife depends on the same facts as the question whether or not there has been desertion on the part of either, and there is no point in taking proceedings on both grounds. We have said " most cases " for where there is a separation deed containing provisions for the support of the wife she will not be left to sue her husband under the deed if he defaults in payment, but can apply for an order on the ground of his wilful neglect to maintain her. Even if he complies with his obligations under the deed, the wife may show a change of circumstances since the execution of the deed and

[1] (1932) 48 T.L.R. 206; 146 L.T. 406.

apply for an order: see *Tulip* v. *Tulip* [2] where the earlier authorities are reviewed, particularly in the dissenting judgment of Harman J.

Nevertheless, where the parties are living apart by agreement the husband is not necessarily guilty of wilful neglect to maintain his wife: see *Baker* v. *Baker*,[3] approved by the Court of Appeal in *Chapman* v. *Chapman* (unreported) but cited in *Pinnick* v. *Pinnick* [4] and *Starkie* v. *Starkie* (*No. 2*).[5]

In several cases in the Divisional Court of the Probate, Divorce and Admiralty Division, including this case, the President has pointed out the difference between the cases where the duty to maintain a wife has been enforced under the Summary Jurisdiction Act and those cases where the obligation has been enforced by the National Assistance Board under the National Assistance Act, 1948. The same distinction has been drawn in the last type of case by Lord Goddard C.J. in the Divisional Court of the Queen's Bench Division in *Stopher* v. *National Assistance Board*.[6]

It has been decided in the last-mentioned case, and the decision was affirmed on appeal to this court, that having regard to the language of sections 42 and 43 of the Act of 1948 a husband is liable to maintain his wife as against the National Assistance Board notwithstanding an agreement to live apart without maintenance. Thus, under that Act the right to maintain subsists independently of the fault of the husband: see *National Assistance Board* v. *Parkes* [7] where it was held in this court that since section 42 (1) of the Act provides that a man shall be liable to maintain his wife the board may bring any husband of an assisted wife before the court under section 43 (1), but once he is before it the court by section 43 (2) "shall have "regard to all the circumstances" including any circumstance recognised by the law as sufficient to relieve a husband of his obligation to maintain his wife. It was further held that desertion or adultery by the wife is a highly relevant circumstance —and it may be a conclusive circumstance—against making an order.

The authorities, in our opinion, are consistent only with the view of the law repeatedly enunciated by the President and his

[2] [1951] P. 378; [1951] 1 T.L.R. 1056; [1951] 2 All E.R. 91.

[3] [1950] W.N. 29; 66 T.L.R. (Pt. 1) 81.

[4] [1957] 1 W.L.R. 644, 650; [1957] 1 All E.R. 873.

[5] [1954] 1 W.L.R. 98; [1953] 2 All E.R. 1519.

[6] [1955] 1 Q.B. 486; [1955] 2 W.L.R. 622; [1955] 1 All E.R. 700.

[7] [1955] 2 Q.B. 506; [1955] 3 W.L.R. 347; [1955] 3 All E.R. 1.

C. A.
1959
LILLEY
v.
LILLEY.

predecessor Lord Merrivale—that whatever may be the position as against the public authority, nevertheless as between the husband and the wife he cannot be found guilty of wilful neglect to maintain her unless he is a wrongdoer. The wrongdoing may, however, consist of the very fact of a failure to maintain. There need be no other matrimonial offence imputed to the husband.

The way the court has interpreted the National Assistance Act, 1948, seems to be in accordance with practical sense, because otherwise a husband and wife might agree together to part without maintenance with the intention that the wife might receive her maintenance from the community through the hands of the National Assistance Board without the husband suffering any diminution of his income.

In our judgment the authorities are consistent on this point, for the dissenting opinion of Denning L.J. as expressed in *Price* v. *Price* [8] and in *National Assistance Board* v. *Parkes* [9] to the effect that the Probate, Divorce and Admiralty Division has at all times misunderstood the liability of husbands to maintain wives in making orders under the relevant statutes has not, so far as we know, found support. The authorities are discussed fully in the judgment of the President in *Pinnick* v. *Pinnick*.[10]

There is in this case no agreement to live apart, but there is a de facto separation which is explained by the wife's state of neurosis, because of which, as the stipendiary found, the wife would be risking grave consequences to her mental health if she returned to her husband at the present time. She maintains that in the circumstances if he does not maintain her apart from him he is guilty of wilful neglect to maintain just as much as if she were separated from him by necessity. Examples of separation by necessity come readily to mind where the occupation of the husband makes it necessary for him to spend long periods apart from his wife by reason of his absence at sea or otherwise away from his home. The changes and chances of life may often, where there is a separation of necessity, put upon the husband the obligation to support his wife when she is separated from him, and if he does not do so he will be guilty of the offence with which he is charged. This duty must surely subsist if separation is forced upon the parties by illness which compels residence in hospital, and this would be the same whatever the nature of the illness, even if it be mental disorder, provided

[8] [1951] P. 413; [1951] 2 All E.R. 580n.
[9] [1955] 2 Q.B. 506, 517.
[10] [1957] 1 W.L.R. 644.

always that the intention of the absent spouse to return to the other continues. Compare the observations of Singleton L.J. in *Keeley* v. *Keeley*.[11]

We see no reason why the obligation to maintain which exists when the husband and wife are living together should be affected by an enforced separation. If the husband does not maintain his wife while in the home he is clearly in default under the statutes, and an enforced separation of itself can make no difference. We would, therefore, with all respect to the opinion expressed by the Divisional Court and by the stipendiary magistrate, have been of opinion that if the wife was not in desertion the husband must, in the circumstances of this case, have committed the offence with which he is charged, subject to consideration of the relative means of the parties.

The remaining question is, therefore, whether the wife is in desertion since she failed to respond to the husband's request to return contained in his letter of April 17, 1957. Accepting the finding of the learned stipendiary, confirmed by the Divisional Court, that because of her neurosis the wife would be risking grave consequences to her mental health if she returned to her husband at the present time, the fact remains that there is a de facto separation between the parties and that all that is necessary to make the wife into a deserter is the intention to desert. Compare *Pardy* v. *Pardy*[12] where a separation which began consensually was altered so as to put the husband in desertion by proof of a supervening animus deserendi. Sir Wilfrid Greene M.R. said: "The first question which arises is whether "or not it is possible in law for a separation which began by "being consensual to acquire the character of desertion without "a previous resumption of cohabitation. Looking at this question "on principle and apart from authority, I can see no reason why "the answer to it should not be in the affirmative. The word "'desertion' may describe an act or it may describe a state. "For the act of desertion both the factum of separation and the "animus deserendi are required. A de facto separation may "take place without there being an animus deserendi, but, if "that animus supervenes, desertion will begin from that moment, "unless, of course, there is consent by the other spouse. Thus, "a husband who leaves his wife for a business voyage may, "nevertheless, become guilty of desertion without the necessity

[11] [1952] W.N. 496; [1952] 2 T.L.R. 756, 760.

[12] [1939] P. 288, 302; 55 T.L.R. 1037; [1939] 3 All E.R. 779.

C. A. 1959

LILLEY v. LILLEY.

" of a previous return. All that is required to establish desertion " in such a case is the presence of a supervening animus deserendi " (a matter to be inferred from the words and conduct of the " deserting spouse), a continuance of the de facto separation, " and the absence of consent by the other spouse."

That there may be physical inability to end the desertion does not prevent it remaining desertion: see *Drew* v. *Drew*,[13] where the deserting husband was in prison. This case was cited with apparent approval by Lord Porter in *Crowther* v. *Crowther*[14] where the question was whether a husband was in desertion who during part of the material time was detained under a reception order in a mental hospital. It had been held in the courts below that a person of unsound mind could not have the intention to desert, but their Lordships were of opinion that it was nevertheless open to the petitioner to prove if she could that the respondent notwithstanding that unsoundness of mind was capable of having an intention to desert his wife.

In this case the only medical evidence called was that of Dr. Hendy, who expressly said that the wife's condition was neurotic rather than psychotic, and we think that her evidence as well as that of Dr. Hendy went to show that she was capable of making a rational decision to desert. The letters which she wrote to her husband support this view. So also does her own evidence given at the hearing before the stipendiary. The following questions and answers are taken from the transcript of her evidence: " (Q.) At any rate, you are determined that you " cannot live with him at the present time? (A.) Yes. (Q.) And " never can? (A.) Definitely not. (Q.) Do you accept that he " wants to live with you? (A.) Yes. (Q.) That he has a home " for you to go into? (A.) Yes. (Q.) That he has kept the home " in the hope that you will go back to him? (A.) I have re- " peatedly told him I can't go back. Surely, he should have " accepted that by now. (Q.) And whatever promises he made " to you with regard to how he would treat you if you came " back to him, you still would not have him back? (A.) No. " (Q.) Do you think, under those circumstances, it is fair to ask " him to maintain you? (A.) Yes." She then gave reasons in support of her contention that it was fair to ask for maintenance.

As to the wife's capacity to make a rational decision, the stipendiary said: " It is clear from the evidence and indeed in " no way in dispute that the wife is capable of making a rational

[13] (1888) 13 P. 97.

[14] [1951] A.C. 723; [1951] 1 T.L.R. 1149; [1951] 1 All E.R. 1131.

" decision and of forming an intention to desert." The President did not, however, consider that this finding was justified by the evidence. He based his decision on an answer given to the court in cross-examination by Dr. Hendy. The question was in this form: " As I understand it, you say that this lady is rational " and in normal mental health except so far as it relates to her " husband? (A.) Yes, and as I said just now, to other men." This question was phrased in an unfortunate form, for it contains two questions. The answer " Yes," if taken to apply to both parts of the question, no doubt qualifies in an important respect the doctor's evidence that the wife was rational, but having regard to the rest of his evidence and the express finding of the stipendiary already read that the rationality of the wife was not in dispute, we cannot regard this answer as sufficient to destroy the effect of Dr. Hendy's evidence in this essential matter, consistent as it is with the view which the magistrate must have formed of the effect of the evidence of the wife herself, and of her letters and her demeanour in court. As Lord Greene said in the passage cited, the animus deserendi must be inferred from the words and conduct of the deserting spouse. In the present case we are of opinion that the conclusion of fact reached by the stipendiary upon this issue was amply justified by the evidence before him. The attitude of the wife went far beyond saying " I cannot return to you at present." She added in effect " and I never will." This expression of her fixed intention appears both from the letters and her statements in court. It had all the appearance of a rational conclusion: it was reached, as is shown by her letter of April 3, 1957, upon the advice of the psychiatrist, in whom she trusted. She is not a person of unsound mind, as was for a time the husband in *Crowther's* case.[15] She has made a deliberate choice for all time, and she cannot properly complain of the natural consequences of her act.

This is no doubt a strong case, for the neurosis of the wife is severe and may be incurable. It may appear hard, therefore, that she should be guilty of desertion if she expresses herself as unwilling ever to return to her husband, but we think that the conclusion that she is in desertion is inevitable on the evidence as it stands at present. We think, moreover, that there is support for the view which we have formed in the decision of the Divisional Court, consisting of the President and Byrne J.

[15] [1951] A.C. 723.

C. A.
1959
LILLEY
v.
LILLEY.

in *Leng* v. *Leng*.[16] It was there emphasised that the neurotic condition of a husband and nothing more is not in law sufficient ground for a wife's refusal to live with him. The President pointed out that unless that were so the ultimate result of a justices' order might in effect be a divorce on the ground of neurosis. In this case we do not think that the neurotic wife can in law justify a refusal ever to return to cohabitation now that the state of desertion for which her husband was responsible has been terminated. From this it follows that she is herself in desertion.

In the result, although for different reasons from those expressed by the Divisional Court, we would dismiss the appeal.

Appeal dismissed. Costs of both parties to be taxed under Third Schedule, Legal Aid and Advice Act.

Solicitors: *Dawson, Loncaster & Co.; Smith & Hudson, for Williamson, Stephenson & Hepton, Hull.*

F. R. D.

[16] (1946) 62 T.L.R. 722; [1946] 2 All E.R. 590.

1960
March 28;
April 1.
Lloyd-Jones J.

MESURE *v.* MESURE.

Husband and Wife—Divorce—Insanity—Care and treatment—Absence from mental hospital for treatment for tuberculosis—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 1 (1) (*d*)—*Divorce* (*Insanity and Desertion*) *Act*, 1958 (6 *& 7 Eliz.* 2, *c.* 54), *s.* 1 (1) (3).

A wife was admitted in November, 1952, as a voluntary patient to a hospital provided by the Minister of Health for the care and treatment of mental illness. She remained there until May, 1955, when she discharged herself from the mental hospital and was at once admitted to a hospital provided by the Minister of Health exclusively for the treatment of pulmonary tuberculosis. Eleven weeks later, she was readmitted to the mental hospital as a voluntary patient and had remained there ever since. In June, 1959, the husband petitioned for dissolution of marriage under section 1

[Reported by D. R. ELLISON, Barrister-at-Law.]

(1) (*d*) of the Matrimonial Causes Act, 1950,[1] on the ground that the wife was incurably of unsound mind and had been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition:—

Held, that the extended meaning of the phrase "under care and "treatment" for the purposes of section 1 of the Matrimonial Causes Act, 1950, which is given by section 1 (1) of the Divorce (Insanity and Desertion) Act, 1958,[2] required that the treatment received in the hospital or other institution referred to in that subsection should be treatment for mental illness; accordingly, the 11 weeks in 1955 during which the wife was in hospital receiving treatment exclusively for tuberculosis constituted an interruption of the continuity of the five-year period. As that interruption was for more than the 28 days permitted by section 1 (3) of the Act of 1958, it was fatal to the husband's case.

Swymer v. *Swymer* [1955] P. 11; [1954] 1 W.L.R. 1329 and 3 W.L.R. 803; [1954] 3 All E.R. 114 and 502, C.A. distinguished.

DEFENDED SUIT for divorce.

The parties were married in July, 1948. After treatment at various hospitals for pulmonary tuberculosis, the wife was admitted as a voluntary patient on November 18, 1952, to St. Ebba's Hospital, Epsom, Surrey, a hospital provided by the Minister of Health for the care and treatment of mental illness. She remained there until May 12, 1955, when she discharged herself in order to be admitted to Cheam Sanatorium, a hospital provided by the Minister of Health exclusively for the treatment of pulmonary tuberculosis. She remained at that sanatorium, under treatment for tuberculosis, until July 18, 1955, on which date, owing to a sudden deterioration in her mental condition, she was readmitted to St. Ebba's as a voluntary patient, where she had ever since remained. By a petition dated June 16, 1959, the husband sought a dissolution of the marriage on the ground that the wife was incurably of unsound mind, and had been continuously

[1] Matrimonial Causes Act, 1950, s. 1 (1): " . . . a petition for divorce " may be presented to the court either " by the husband or the wife on the " ground that the respondent— . . . " (*d*) is incurably of unsound mind " and has been continuously under " care and treatment for a period of " at least five years immediately pre- " ceding the presentation of the " petition."

[2] Divorce (Insanity and Desertion) Act, 1958, s. 1 (1): " . . . a person " shall be deemed to be under care " and treatment for the purposes of " [section 1 of the Matrimonial " Causes Act, 1950] . . . at any time " when he is receiving treatment for " mental illness—(*a*) as a resident in " a hospital or other institution pro- " vided . . . by any Minister . . . " (3) In determining for the purposes " of the said section 1 . . . whether " any period of care and treatment " has been continuous, any interrup- " tion of such a period for 28 days or " less shall be disregarded."

1960

MESURE v. MESURE.

under care and treatment for a period of at least five years immediately preceding the presentation of the petition. The wife, by the Official Solicitor as her guardian ad litem, filed an answer in which, inter alia, she denied that she had been continuously under care and treatment for the requisite period, and prayed for the petition to be dismissed. The evidence established that at the date of the hearing of the suit, the wife was incurably of unsound mind.

G. H. Crispin and *H. B. Figg* for the husband. The evidence establishes that the wife is now incurably of unsound mind as that phrase was construed in *Whysall* v. *Whysall*.[3] During the 11 weeks that she was in Cheam Sanatorium she received occupational therapy treatment by means of handicrafts similar to that which she had received at St. Ebba's. She should, therefore, be regarded as having continued to be under care and treatment for mental illness whilst at Cheam Sanatorium. [*Swymer* v. *Swymer*[4] was referred to.] The wording of section 1 (1) of the Divorce (Insanity and Desertion) Act, 1958, does not limit the "hospital or other institution" concerned to a mental hospital. Residence at Cheam Sanatorium satisfies the requirements of the subsection.

R. B. Holroyd Pearce and *N. A. Medawar* for the wife. The period of 11 weeks spent by the wife at Cheam Sanatorium constituted a fatal interruption in the continuity of the five-year period of care and treatment required by section 1 (1) (*d*) of the Matrimonial Causes Act, 1950. A "hospital or other institution" within the meaning of section 1 (1) of the Divorce (Insanity and Desertion) Act, 1958, means an institution provided for the treatment of mental illness. Cheam Sanatorium is a hospital provided for the treatment of tuberculosis and is, therefore, outside the subsection.

Cur. adv. vult.

April 1. LLOYD-JONES J. referred to the facts and the proceedings, and continued: According to the evidence of the physician superintendent of St. Ebba's Hospital, Dr. Batt, the wife discharged herself under medical direction from that hospital on May 12, 1955, it being in his opinion essential that she should

[3] [1960] P. 52; [1959] 3 W.L.R. 592; [1959] 3 All E.R. 389.

[4] [1955] P. 11; [1954] 1 W.L.R. 1329 and 3 W.L.R. 803; [1954] 3 All E.R. 114 and 502, C.A.

take this step as a preliminary to her being transferred to Cheam Sanatorium. Whether or not his opinion was well founded in law was in issue, but the undoubted fact is that the wife ceased to remain as a patient at St. Ebba's and was no longer, to use an expression taken from the case of *Swymer* v. *Swymer*,[1] " on the " books " of that hospital. The only document which accompanied her on her admission to Cheam Sanatorium was a letter dated May 11, 1955, signed by a physician on the staff of St. Ebba's, which gave an outline of the wife's medical history since the date of her admission to that hospital. That letter dealt primarily with the history of the patient's tuberculosis, but it contained incidental references to her mental state and the treatment given in relation to it and the results achieved.

Counsel for the wife called as a witness Dr. Hanneson, the medical superintendent at Cheam Sanatorium, who personally remembered the admission of the wife to that hospital on May 12, 1955, and who was able to state that apart from the physician's letter, no documents or reports or notes concerning the wife were transmitted to Cheam Sanatorium. There were no directions in regard to treatment of her mental condition, and no requests for reports, nor was any report in fact made to St. Ebba's concerning her. Dr. Hanneson testified that Cheam Sanatorium is a hospital provided by the Minister for the treatment exclusively of pulmonary tuberculosis, and had no means or equipment for the treatment of mental illness. At Cheam Sanatorium the wife received routine treatment for pulmonary tuberculosis only. A normal part of that routine treatment is occupational therapy by means of handicrafts; and in this respect the wife in fact continued to occupy herself in the same way as she had been in the habit of doing at St. Ebba's, before her discharge from there and her transfer to Cheam Sanatorium. Dr. Hanneson made it plain that she, like all other patients at the sanatorium undergoing treatment for pulmonary tuberculosis, would have been required in any event to undertake this form of occupational therapy, and that her having done so at Cheam was in no way related to treatment for mental illness or to treatment other than for her tubercular condition.

According to Dr. Hanneson, there was a sudden deterioration in the wife's mental condition in July, 1955, which caused him, on his own initiative, to get into communication with St. Ebba's,

[1] [1955] P. 11; [1954] 1 W.L.R. 1329 and 3 W.L.R. 803; [1954] 3 All E.R. 114 and 502, C.A.

1960

MESURE v. MESURE.

Lloyd-Jones J.

and the wife was readmitted there as a voluntary patient on July 18, 1955. Dr. Batt, the only medical witness called by the husband, was unable to give any reason, of his own knowledge, for the wife's readmission to St. Ebba's.

It would appear to be plain from the letter dated May 11, 1955, to which I have already referred, which accompanied the wife on her transfer to Cheam Sanatorium, that she had made marked progress in her recovery of mental health at that stage, and it is in my view implicit in the terms of that letter that she was regarded as a person who might, after treatment at the sanatorium, in due course have returned to her home, and certainly not as one who would automatically or inevitably have returned to St. Ebba's. In fact, however, although Dr. Batt was not able to give direct evidence about the wife's mental condition on her readmission to St. Ebba's, he stated that she had remained, and still was two days before the hearing of the suit, a person who would not be able to look after her children or completely manage her own affairs or look after herself, that in spite of the beneficial effect of treatment no further improvement was to be expected, and that there was no real chance of her being able to resume her duties as a wife and mother in the normal way. That meant that this wife was now, according to the statute, and on the authority of the decision of Phillimore J. in *Whysall* v. *Whysall*,[2] incurably of unsound mind.

It is common ground that under the provisions of section 1 (1) (*d*) of the Matrimonial Causes Act, 1950, unless there was a certification at the commencement of the period of five years referred to in that subsection, the subsection had no application. It is further common ground that by section 1 of the Divorce (Insanity and Desertion) Act, 1958, an amending Act, the requisite of initial certification is no longer necessary. It is now sufficient to prove that the respondent was a voluntary patient at such an institution as is referred to in section 1 (1) (*a*) of the Act of 1958. The material parts of section 1 of the Matrimonial Causes Act, 1950, provide that a petition for divorce may be presented to the court either by the husband or the wife on the ground that the respondent is incurably of unsound mind, and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition.

Section 1 (1) of the Divorce (Insanity and Desertion) Act, 1958, reads as follows: " Notwithstanding anything in subsection (2) of

[2] [1960] P. 52; [1959] 3 W.L.R. 592; [1959] 3 All E.R. 389.

" section one of the Matrimonial Causes Act, 1950, . . . a person " shall be deemed to be under care and treatment for the purposes " of the said section one, . . . at any time when he is receiving " treatment for mental illness—(*a*) as a resident in a hospital or " other institution provided, approved, licensed, registered or " exempted from registration by any Minister or other autho- " rity . . ." Section 1 (3) reads: " In determining for the " purposes of the said section one . . . whether any period of care " and treatment has been continuous, any interruption of such a " period for 28 days or less shall be disregarded."

The wife's counsel submitted (1) that the wife had not been under continuous care and treatment for the period of five years provided by section 1 (1) (*d*) of the Matrimonial Causes Act, 1950, since the period of 11 weeks at Cheam Sanatorium had interrupted the continuity for more than the period of 28 days which, by section 1 (3) of the Act of 1958, is to be disregarded; and (2) that in order to bring a case within section 1 (1) of the Act of 1958, it was necessary, as a matter of construction, and in order to make sense of section 1 (1) (*a*), that the hospital envisaged should be one provided for the purpose of the treatment of mental illness, and that such words must be read into that subsection, and that on the evidence Cheam Sanatorium was not such a hospital. It was urged that the language of section 1 (1) (*b*) supported and confirmed this as the proper construction of section 1 (1) (*a*). The importance of this submission is that it is said that the widening of the provision of section 1 (2) of the Matrimonial Causes Act, 1950, by the amending Act of 1958, so as to make treatment as a voluntary patient a sufficient commencement of the statutory five-year period still makes it necessary that the treatment for mental illness should be given to a person who is resident at a hospital which is in fact provided specifically for such a service.

I agree with the submission that the wife, for a period of 11 weeks while at Cheam Sanatorium, was not receiving treatment for her mental condition or mental illness. I do not think that the coincidence that treatment both for pulmonary tuberculosis and for mental illness includes occupational therapy is a sufficient reason for holding that she was receiving treatment for mental illness at Cheam Sanatorium. There was, therefore, an interruption in her treatment for mental illness of considerably more than the permitted 28 days. She was transferred purely for treatment of a tubercular condition; she was discharged and no longer " on " the books " of St. Ebba's; she might, as I understand the evidence, never have returned there; in these circumstances her

1960

MESURE
v.
MESURE.

Lloyd-Jones J.

case is wholly distinguishable, in my judgment, from the case of *Swymer* v. *Swymer*,[3] to which I have already made allusion. I have the judgments in that case well in mind, and I fully appreciate the injunction that the term "continuous" is not to be construed narrowly or strictly. The ratio decidendi of that case is none the less in my view based on the fact that the husband remained on the register of Bexley Hospital or, to use the more popular expression, "on its books," and that hospital continued to require and to receive reports concerning him. There is no such evidence in the present case. Indeed, the evidence in this case is to the contrary effect.

Finally, I agree with the submission that a proper construction of section 1 (1) (*a*) of the Act of 1958 requires that the voluntary patient should be receiving treatment for mental illness as a resident in a hospital or other institution of the kind referred to in that subsection, and therefore a hospital or institution provided for the purpose of giving mental treatment. In my view, the reliance in support of this construction placed on section 1 (1) (*b*) is fully warranted, and it is only in this way that a proper meaning can be given to this amending section.

For the husband it was contended that it was not necessary to construe subsection (1) (*a*) by reference to subsection (1) (*b*); and that residence at any hospital that fell within the limits of subsection (1) (*a*) was sufficient. It was further contended that as the wife in fact received treatment in the form of occupational therapy which she had previously received at St. Ebba's, such treatment, though not prescribed or designed as treatment for mental illness, was none the less in fact treatment for mental illness. For the reasons I have already indicated I am unable to accept these submissions; and the prayer in the petition is accordingly rejected. I therefore dismiss the petition.

Order accordingly.

Solicitors: *Culross & Co.; Official Solicitor.*

[3] [1955] P. 11.

SCHLESINGER *v.* SCHLESINGER.

1959
Nov. 23.

Sachs J.

Husband and Wife—Maintenance—Judicial separation—Quantum—Wealthy husband—Assessment of "just" amount—Effect of taxation—Husband domiciled abroad: wife resident in England—"Jointure" test no longer usefully employable in assessing amount—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 20 (2).

A wife, who had been granted a decree of judicial separation, applied for an order for permanent alimony. The parties were domiciled in South Africa, the wife residing in England. It was agreed during the proceedings, in order to avoid the expense and delay of discovery, that the husband, a man of great wealth, should be treated as having a notional income of £110,000 a year, such income to include his salary of £18,000 a year (on which he paid income tax in South Africa approaching some £10,000). His net capital assets were valued by him at a sum approaching two million pounds. The wife had no capital or income of her own.

The registrar made an order for permanent alimony at the rate of £12,000 a year; and in doing so considered that the upper limit for such an award must surely be near when something like one-eighth of the order went to the wife, and seven-eighths to the Revenue. He further considered that it would have been possible to make a larger order had the husband paid British tax and, accordingly, been able to get a surtax rebate. The wife appealed:—

Held, (1) that although the tax position of both parties was relevant, and was not infrequently an important factor in cases where large sums of money were involved, the registrar was wrong in holding that an order which would otherwise have been just should not be made merely because the Revenue took so much of the allotted sum (post, pp. 195–196).

(2) That it was clearly erroneous to suggest that because a lavish-living man with a notional income of £110,000 a year had so arranged his affairs that only £18,000 attracted tax he could pray that fact in aid against his wife's just claims (post, p. 196).

(3) That the function of the court in such cases, whether upon divorce or judicial separation, was to look at the realities, and to take into consideration the position in which the parties were, and the position in which the wife was entitled to expect herself to be and would have been, if her husband had properly discharged his marital obligation (post, p. 197).

N. v. *N.* (1928) 44 T.L.R. 324, 327; *J.* v. *J.* [1955] P. 215; [1955] 3 W.L.R. 72; [1955] 2 All E.R. 85, C.A. applied.

(4) That having regard to the scale upon which the parties had formerly lived together and to the financial position of the husband, the wife was entitled to an award which would enable her to live on a really high standard. A proper sum would be such as would give her something between £5,000 and £6,000 a year after payment of tax, and a gross figure, therefore, of £20,000 a year should accordingly be awarded (post, p. 199).

1959

SCHLESINGER v. SCHLESINGER.

(5) That in view of the great increase in taxation and death duties, and the fact that today high standards of living could often only be maintained by wealthy men if they used either capital or capital profits, it was doubtful whether the former test of basing an award upon what would be an adequate jointure for a wife after the death of a wealthy husband, could usefully be employed today, in particular when the husband lived to any material extent on capital (post, p. 200).

Kettlewell v. *Kettlewell* [1898] P. 138; 14 T.L.R. 96; *Gilbey* v. *Gilbey* [1927] P. 197; 43 T.L.R. 283 considered.

SUMMONS by wife on her appeal against an order for permanent alimony made by Mr. Registrar Kinsley on July 17, 1959.

On May 12, 1958, Davies J. granted the wife, who had filed her original petition in December 1953, a decree of judicial separation in the exercise of her discretion upon the ground of adultery. She did not proceed with charges of cruelty. Although adultery was found to have been committed by the husband with an unknown woman in 1949, with a named woman C. between May and December 1952, and with a further named woman N. between 1953 and 1956, the only woman named in the decree was the woman N., who had intervened. The wife's admitted adultery was after the husband had committed adultery with the first two women. On June 16, 1958, she gave notice of appeal to the Court of Appeal, asking that the decree in her favour be set aside, and that there should be a rehearing of the suit on the grounds, inter alia, that the court had not inquired into the charges of cruelty, and that although the court had accepted the husband's admissions of adultery with the first two women, it had not decreed the judicial separation on the grounds of such adultery. On December 18, 1958, the Court of Appeal dismissed her appeal save as to the form of the decree.[1]

On May 13, 1958, the wife had issued an application for an order for permanent alimony for herself under section 20 (2) of the Matrimonial Causes Act, 1950,[2] and for maintenance of the two children, such children being in her custody. On July 17, 1958, Sachs J. held that since the notice of appeal had revived the original lis, she was entitled to apply for alimony pendente lite[3] (although no order was in fact made before the hearing of the appeal). After the matter of permanent alimony and

[1] [1959] 1 W.L.R. 92; [1959] 1 All E.R. 155.

[2] Matrimonial Causes Act, 1950, s. 20 (2): "On any decree for "judicial separation, the court may "make such order for the payment of "alimony to the wife as the court "thinks just."

[3] [1958] 1 W.L.R. 882; [1958] 3 All E.R. 20.

maintenance had come before the registrar, it was agreed in order to avoid the expense, delay and potential cumbersomeness of proceedings for discovery that the husband should be treated as having a notional income of £110,000 a year, to include his salary of £18,000 a year (on which he paid income tax approaching some £10,000), and an income of £263 a year from his net assets which were valued by him at £1,819,507. The wife had no capital or income of her own.

The parties were domiciled in South Africa; the wife, who was born and brought up in the United States of America, resided with the children in England, where she had been living for several years.

Mr. Registrar Kinsley made an order for permanent alimony of £12,000 a year, with further provision for the children; and in his report he stated: "The upper limit for alimony has never been "fixed, but it seems to me that when the stage is reached at "which the husband is paying something like one-eighth of the "order to the wife and seven-eighths to the Revenue surely the "limit must be near. I repeat, however, that if the husband paid "British tax his rebate on surtax would make it possible to make a "larger order . . . If the order were for £35,000 as asked on "behalf of the wife the husband would be pouring money into "the Revenue without any very substantial benefit to the wife, "and it would be in the nature of punishment so far as the "husband is concerned. I think that the question of tax must be "taken into account in arriving at the amount of the order."

The wife appealed.

As matters relating to the children and to the maintenance to be provided for them were also under consideration before his Lordship, the application as a whole was dealt with in chambers and not adjourned into court for argument or judgment. On it later appearing, however, that no appeal was being entered upon any part of the order, authority was, on request, given by his Lordship to report so much of his judgment as concerned the principles applicable where the husband was a man of great wealth.

The facts relevant to the award of permanent alimony are set out in the judgment.

Geoffrey Crispin for the wife.

James Stirling Q.C. and *Victor Williams* for the husband.

Argument was in chambers.

Cur. adv. vult.

1959

SCHLESINGER v. SCHLESINGER.

SACHS J. This appeal by the wife as to the amounts payable to herself and to her two children upon her decree for judicial separation concerns such large sums and involves such unusual features that I have taken time to await information, provided on November 7, 1959, as to the effect of certain provisions of the Income Tax Acts of South Africa and to consider the matter as a whole.

The main difficulties arise in assessing what under the provisions of section 20 (2) of the Matrimonial Causes Act, 1950, is the figure which in its discretion the court should conclude is "just." It being necessary to consider in a broad way the position of the parties as a whole, it is convenient at the outset to mention some salient facts as to both of them.

The husband is domiciled in South Africa; he is head of what has been termed The Schlesinger Organisation or Schlesinger Empire, a series of interlocking companies of vast assets; he is what a leading counsel of his described as an important figure; and, indeed, he appears in the Dominion to be a front-page or headline character. It is common ground that at all material times he has lived and continues to live in a very luxurious manner, described by himself as "lavish," and by his wife as "grandiose."

In an affidavit dated March 19, 1957, he swore that the value of all his assets as at February 18, 1957, amounted to a total of £159,753. By an affidavit dated July 7, 1958, after the above figure had been challenged, he swore that, on May 15, 1958, his net assets were valued at £1,819,057, and that the total annual income derived from them was £263; that in addition he had a salary of £18,000 per annum on which he paid tax of about £10,000; and that the lavish style in which he lived was, in effect, largely due to the exigencies of his business affairs and to a considerable extent paid for by the organisation of which he was head. He denied that his personal expenditure approached the figure of £75,000 per year, but he has not anywhere stated an affirmative figure.

It is a proper inference from the above facts that he is a man who is capable of arranging, and a man who, in fact, chooses to arrange his affairs so that he can draw indefinitely on capital rather than have an income from his investments, and so that in addition he can obtain great benefits in the way of "expenses" either by way of allowances or in kind.

By an agreement between counsel reached on June 8, 1959,

in order to avoid the expense, delay and potential cumbersomeness of proceedings for discovery, it was agreed that he should be treated as having a notional income of £110,000 per annum, to include the above-mentioned sums of £18,000 and £263. Also by agreement no further figures have been supplied to the court of a later date than those set out in the affidavit of July 7, 1958, and it has been assumed that since then no material alteration has occurred in the husband's financial affairs or in the incidence of South African taxation.

The wife, who was born and brought up in the United States of America, has no capital or income other than that which she may receive from the husband; she has for several years been living in this country; and she has been given the custody of the two children. She lives at present in a furnished flat in Gloucester Road, S.W.7, but is due to leave those premises on the expiry of the lease.

I will first deal with certain points which were raised in argument but which can conveniently be disposed of before further dealing with the main issue. In the affidavits and, indeed, to some extent in argument, it was expressly or impliedly suggested that the husband was, on the financial side, in some way entitled to have taken into account in his favour that the wife had elected to take up her residence in this country. [His Lordship considered the circumstances, rejected the suggestion, and continued:] Accordingly, my view of the present matters before me proceeds on the basis that the wife has acted reasonably in taking up residence with her children here.

Another point that was argued, this time on behalf of the wife, was that the husband had made no offers which would mitigate the difficult tax position which any substantial order for alimony involves. The court cannot, however, deal with matters differently than it otherwise would because no such offers have been made. If offers are in fact made, then and only then can they be taken into account.

Thirdly, there was the argument raised with success before the registrar which resulted in his expressing a view that the upper limit for alimony must surely be near when the stage is reached that "something like one-eighth of the order goes to "the wife and seven-eighths to the Revenue." If, as would appear, this means that an order which would otherwise be just should not be made merely because the Revenue take so much of the allotted sum, that view is, to my mind, wrong.

Fourthly, I must refer to the registrar's further statement

1959

SCHLESINGER v. SCHLESINGER.

Sachs J.

in relation to the facts of this particular case to the effect that the size of the order would be different if the husband could get a British surtax rebate. This view is really another way of putting his above point as to the upper limit and is thus not correct in principle. Moreover, it would appear that when he made that statement he cannot have had put before him the true facts, now agreed by both parties, as to the tax position in South Africa.

Naturally, the tax position of both parties is relevant and is not infrequently an important factor in these cases; but South Africa, like this country, has its system of allowing to be deducted from taxable income for tax purposes payments made direct to a wife under a court order. Thus, if an order for £18,000 per annum is made in the present case the husband would save the £9,336 tax to which he refers in his affidavit of July 7, 1958. Moreover, to suggest that because a lavish-living man with a notional income of £110,000 per annum has so arranged his affairs that only £18,000 attracts tax he can here pray that fact in aid against his wife's just claims is clearly erroneous. Further, there is something unreal in speaking of an otherwise just order that leaves a guilty husband with a real annual spending power as truly enormous as in this case as " punishment " (a word used by the registrar but not defended by Mr. Stirling).

I have thus no doubt that the registrar has been led into error of principle on more than one count in this matter and, accordingly, I am going to approach the main issue de novo with a fresh mind.

[His Lordship then referred to the nature of the wife's discretion statement, and the husband's adultery, and continued:] Nonetheless, the husband is, in my view, entitled to have consideration given to whether that conduct of his wife should be taken into account. (I pause to mention that both counsel have agreed that as regards alimony after a decree of judicial separation all the material tests, at any rate in the present case, are the same as if there had been a decree of divorce, and so I have not further examined the law on this point.) I propose, however, to approach this issue on the basis that the court's function is to arrive at whatever figure is just, taking the position as a whole, and not on the basis that in some way the wife has forfeited all her rights and must win her way back step by step. I would add that if that latter approach is the one the registrar interpreted *Clear* v. *Clear* [1] as

[1] [1958] 1 W.L.R. 467; [1958] 2 All E.R. 353, C.A.

deciding to be proper, I respectfully find myself in disagreement with him.

[His Lordship then considered to what extent the wife's conduct should affect the award of maintenance and came to the conclusion that some account should be taken of her conduct, but by no means to the extent urged by counsel for the husband.]

I turn now to the question of the amount which should, having regard to the facts as a whole, be paid to the wife, a by no means easy matter. A number of authorities relating to really wealthy parties have been cited. They all concern circumstances in periods before the Second World War. Since that war, however, taxation has risen to heights which the learned registrar rightly described as fantastic; the purchasing power of money has decreased enormously; and there has arrived an era in which it is well known that there are rich men who live on capital, very often on capital profits, much more than they do on income. No authority has been cited to me where the combined effect of these changes has been discussed, and it is those changes which cause the difficulty in the present case.

It still remains, of course, the function of this court to endeavour to show that degree of practical wisdom and to look at the realities of the case in the way that Lord Merrivale P. laid down in *N.* v. *N.*[2] There are two general criteria which have won approval in the past: one is that referred to in the above cited case in the words[3]: "I conceive that I must take "into consideration the position in which they were and the "position in which she was entitled to expect herself to be and "would have been, if her husband had properly discharged his "marital obligation." This test was approved by Hodson L.J. as recently as *J.* v. *J.*,[4] where the husband's standard of living had nothing to do with his taxable income. The other can be described as the jointure test, which, in relation to husbands with large incomes, is referred to in *Kettlewell* v. *Kettlewell*[5] (when income tax was 8d.), and then in other large income cases, including *Gilbey* v. *Gilbey*,[6] when £4,000 was awarded to a wife who would have had to pay 4s. in the £ income tax, and an average of less than 1s. 3d. supertax on income above £2,000 per annum.

[2] (1928) 44 T.L.R. 324.
[3] Ibid. 328.
[4] [1955] P. 215, 242; [1955] 3 W.L.R. 72; [1955] 2 All E.R. 617; varying [1955] 2 W.L.R. 973; [1955] 2 All E.R. 85.
[5] [1898] P. 138; 14 T.L.R. 96.
[6] [1927] P. 197; 43 T.L.R. 283.

1959

SCHLESINGER v. SCHLESINGER.

Sachs J.

For reasons which I will deal with a little later, it seems best first to consider what in the light of all the circumstances is the sum which should be paid to the wife as being just, taking into account all those factors to which the authorities refer, other than the jointure test, and then to examine whether that latter test should be applied and if so what is its effect.

Whilst she was living with her husband the wife was a woman who was receiving £3,000 per annum tax free by monthly instalments of £250. In addition all her clothing was being paid for by her husband, and over and above that she had at her disposal the residences, cars and world travel facilities which, taken with all other matters, resulted in her leading a life of that sumptuous nature that can only be provided by a husband who has vast sums at his disposal and is prepared to spend them. It is a scale of living which cannot do otherwise than involve an annual expenditure of five figures several times over. Taking the facts as a whole it is clear that the husband was not only prepared so to live but enjoyed so doing; his suggestion of having, in effect, been compelled to live on that scale for business reasons must be taken with a strong grain of salt—though no doubt many travelling and other expenses were, under the arrangements earlier referred to, legitimately paid for by the organisation of which he was head.

The wife's present position is that she is living here, is taking that course reasonably, and is liable to the consequent taxation. (I pause only to note that if she went to the United States of America, taxation might not prove much lower there than in this country, and the views of the courts there on alimony might be found to relate to higher levels of payments than here.) The wife has no capital out of which to provide herself with a house, the appropriate furniture, or a car and its replacements. She is expected at least to live in the style which is reasonable as one having the custody of the two children; that is a style which the husband, indeed, has put higher than is my own view—it is he and not the wife who has spoken in terms of a flat in Grosvenor Square.

The wife herself is not suggested to have been otherwise than a good wife until sometime after the commencement of those matters which are referred to in her evidence before Davies J., and it has always been common ground that she has been a good mother to the children.

In the result, whilst in all the circumstances it does not

seem to me that she is entitled to expect to live on that astonishingly high "Rolls Royce plus" standard of the days when she was in South Africa, she is yet, to my mind, entitled to live on a really high standard, to be able to travel, and to be able out of her income to provide such furniture and such car as may be appropriate.

What then is the just figure at which the court in its discretion should fix the wife's alimony, having regard to that "generous ambit within which reasonable disagreement is "possible" on such a matter? To my mind, the wife should have available, after payment of tax, something between £5,000 and £6,000 a year, and taking into account those matters which I have previously mentioned, and the figures agreed at the Bar as to the effect today of taxation, I would on a broad view fix the gross figure at £20,000 a year.

It is to be noted that this figure will result in the husband having to pay about £9,000 a year less tax than previously, and that out of a notional income of £110,000 per annum gross and about £100,000 after tax (I am taking the pre-decree figures) he will thus now be left with about £90,000 per annum after tax instead of the previous £100,000. (Those figures I have, of course, calculated in each case without taking into account any sums which he may have to pay to or in respect of the children.) Further, the figure I have fixed would not, in the upshot, seem to be very different from what the registrar might have thought just if he had not been misled in his mind on the question of "punishment" via the high incidence of taxation. It is an order which, taking due account of taxation, provides the wife with less than half the purchasing power achieved by the Gilbey order of £4,000 per annum; and it is not the highest annual figure that can be found in the records of this court. Strangely enough, despite its apparent great size, my only real doubt has been whether it ought not to be somewhat higher.

Returning now to the jointure test much stressed by Mr. Stirling, the first question is what is meant by the word "jointure" in the context in which it was used in the various cases relating to the maintenance of rich men's wives. If the word was used in the technical sense in which it has been said that the power of jointuring is peculiar, stands on its own footing and is, in effect, a substitute for dower, it, of course, relates to something which is no longer in general current use. If, however, as seems more probable, it is used in what Stirling J. in 1896

1959

SCHLESINGER v. SCHLESINGER.

Sachs J.

considered to be its prima facie sense, i.e., "A jointure is a "provision for the wife after the death of her husband" (see *In re de Hoghton* [7]), then the word has a broader meaning. But, even so, the phrase "reasonable jointure," in so far as it means "reasonable provision," adds very little to the word "just" as incorporated in the modern statutes relating to alimony. Nor does the fact that jointures were not necessarily confined to provision commencing on the death of the husband add to the assistance which that phrase can render here in relation to matters of amount.

Moreover, on any proper interpretation of the word jointure it is clear that it connotes a provision by way of income that would normally be charged upon land or securities producing or capable of producing some fixed or, at any rate, fairly steady interest. It originated in the days when a relict was expected to retire quietly either to a dower house or to some other suitable residence, and it continued to be used in the era when to say of a man of substance that he lived on capital might well be defamatory, and when the effect of death duties was not a major factor. Today, when high standards of living can often only be maintained by wealthy men if they use either capital or capital profits, the idea that a millionaire would necessarily or even normally make his sole provision for a good wife by means of some fixed income charged on capital has an element of unreality. Whether by settlement or by will, he might well be expected to provide a substantial capital sum upon terms that she not only had a life interest in it, but that the trustees could under appropriate powers make available part of it for purchasing a house for her. One would also expect there to be other powers for raising moneys out of capital so that she might maintain a relevant standard of living without unduly attracting taxation.

As regards the class of case under consideration, it thus seems doubtful whether the jointure test can today be usefully employed as the second of the criteria previously mentioned: in particular it hardly seems apt when a husband lives to any material extent on capital. Indeed, it may well on occasions conflict with the first of those criteria, viz., that a good wife should during her husband's lifetime be entitled not to have her standard of living lowered simply because her husband had made life with him intolerable—a conflict which would seem inevitable

[7] [1896] 2 Ch. 385, 392.

1959

SCHLESINGER v. SCHLESINGER.

Sachs J.

where, for instance, death duties would materially affect the position after the husband's death or where the facts are of the type discussed in *J.* v. *J.*[8]

An additional point against the use here of the jointure test is that (speaking with considerable diffidence, but not without having made some inquiries) an assessment of what here would be a " proper jointure " not only involves for me a considerable element of speculation, but might well raise amongst those better versed in jointures an area of doubt greater if anything than that engendered by the simple word " just."

Thus I do not think that the jointure test can help in this case, even if, which I doubt, it is applicable. Accordingly I adhere to the gross figure of £20,000 previously mentioned as being that which, to my mind, is just.

I would add, however, that the facts of this case point somewhat sharply to the desirability of considering whether the Matrimonial Causes Act, 1950, might not be so amended as to enable the courts to order husbands in a position comparable to that of Mr. Schlesinger to make on the wife a proper settlement framed on modern lines.

The result is that this appeal is successful and that the registrar's order dated July 17, 1959, will be varied by substituting for the present figure appearing therein the sum, as regards payments to the wife, of £20,000 per annum.

Solicitors: *Culross & Co.; Crossman, Block & Co.*

J. B. G.

[8] [1955] P. 215.

COMPTON (MARQUESS OF NORTHAMPTON) *v.* COMPTON (MARCHIONESS OF NORTHAMPTON) AND HUSSEY.

1960 *Feb.* 1.

Marshall J.

Husband and Wife—Settlement—Variation—Interests of children—Post-nuptial settlements upon the children with the wife as trustee and with powers of appointment—Propriety of guilty wife to remain trustee and retain powers—Absence of evidence she would abuse her position — Applications to remove trustees — Chancery Division appropriate—Settlement of wife's property—Marriage broken by wife's adultery—Property given to her by husband—Restoration of pecuniary status—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *ss.* 24 (1), 25.

The parties were married in 1942 when the husband was 56 and the wife 22, and there were four children, namely, girls born in

1960

COMPTON v. COMPTON AND HUSSEY.

1943 and 1944, and boys born in 1946 and 1947. The parties separated in 1957, and the marriage was dissolved in 1958 on the ground of the wife's adultery with the co-respondent, whom she subsequently married and who benefited under her will.

Settlements were made in 1946 in favour of each of the two daughters, and in 1947 in favour of each of the two sons, out of moneys provided solely by the husband: the wife was a trustee under all four settlements. She had a life interest in certain events under the settlements in favour of the daughters, and a power of appointment under those in favour of the sons.

In 1947 the husband executed a deed of gift in favour of the wife, under which property and other investments to the value of £121,350 were transferred to her, the estimated value of which had increased to some £227,000 by the date of these proceedings. A further sum of £19,000 was given to the wife in 1948.

The husband applied after the divorce for a variation of the four settlements under section 25 of the Matrimonial Causes Act, 1950,[1] to extinguish the rights, powers and interests of the wife as if she were dead or had died at the date of decree absolute. The extinction of the life interest was not resisted by the wife. The husband further applied under section 24 of the Act[1] for an order on the wife to execute a settlement in favour of the children out of the property and investments he had given her. It was proposed on behalf of the children that the sum to be settled should be £140,000:—

Held, (1) that the settlements upon the children were post-nuptial settlements within the meaning of the section, for they were made in the course of the marriage, they dealt with the interests of the children, and the wife had been given powers over the disposal of the property as trustee and otherwise (post, p. 210).

Observations in *Hargreaves* v. *Hargreaves* [1926] P. 42, 45; 42 T.L.R. 252 applied.

(2) That the wife should remain as a trustee, for there was no evidence to suggest that she was likely to abuse her position. The appropriate Division, moreover, in which to apply for the removal of trustees was the Chancery Division (post, p. 211).

[1] Matrimonial Causes Act, 1950, s. 24 (1): "If it appears to the court "in any case in which the court pronounces a decree for divorce or for "judicial separation by reason of the "adultery, desertion or cruelty of the "wife that the wife is entitled to "any property either in possession or "reversion, the court may, if it thinks "fit, order such settlement as it "thinks reasonable to be made of the "property, or any part thereof, for "the benefit of the innocent party, "and of the children of the marriage "or either or any of them."

S. 25: "The court may after pronouncing a decree for divorce or for "nullity of marriage enquire into the "existence of ante-nuptial or post-"nuptial settlements made on the "parties whose marriage is the sub-"ject of the decree, and may make "such orders with reference to the "application of the whole or any part "of the property settled either for the "benefit of the children of the mar-"riage or of the parties to the "marriage, as the court thinks fit, "and the court may exercise the "powers conferred by this section "notwithstanding that there are no "children of the marriage."

(3) That the wife should also retain her powers of appointment, which were in any event limited, for there was the possibility in view of their ages that she would survive her husband, she remained the children's mother and had access to them, and there was no evidence that the interests of the husband or the children would be prejudiced by her continuing to hold the powers so long as she continued properly to act as trustee (post, p. 213).

(4) That the wife should, however, be ordered to execute a settlement of £140,000 or its equivalent upon the four children, for it was the duty of the court to restore, as far as was reasonable and just, the pecuniary status of the parties that had so materially been changed by the wife's adultery and the divorce. The money had been given to her from family resources in the belief that the marriage would continue, and that on his death she would use it for her widowhood and for the benefit of the children; and although she had left her residuary estate to them in the will benefiting her second husband, there was no guarantee what the amount of that estate would be (post, pp. 216, 217, 218).

March v. *March and Palumbo* (1867) L.R. 1 P. & M. 437, 440 applied.

APPLICATIONS by husband for variation of settlements, and for settlement of the wife's property, under sections 25 and 24 of the Matrimonial Causes Act, 1950, adjourned into court for judgment.

The parties were married on June 18, 1942, when the husband was 56, and the wife 22 years of age. There were four children: Lady Judith Compton, born on September 26, 1943; Lady Elizabeth Compton, born on December 7, 1944; the Honourable Spencer Douglas David Compton (otherwise Earl Spencer Compton), born on April 2, 1946; and the Honourable William James Bingham Compton, born on November 26, 1947.

The parties separated in 1957, and a decree nisi was pronounced on July 25, 1958, on the ground of the wife's adultery with the co-respondent, whom she married after that decree had been made absolute on October 28, 1958.

The following statement of facts is substantially taken from the judgment: By an application dated October 6, 1958, the court was asked to exercise its powers under section 25 of the Matrimonial Causes Act, 1950, to vary the terms of four post-nuptial settlements so as to extinguish the rights, powers and interests of the wife as if she were dead or had died at the date of the decree absolute. The settlements in question were all made in favour of children of the marriage, out of moneys provided solely by the husband on the following dates: (a) December 19, 1946, Lady Judith Compton settlement; (b) December 19, 1946, Lady Elizabeth Compton settlement; (c) April 11, 1947, a settlement in

1960

COMPTON v. COMPTON AND HUSSEY.

favour of the younger children which at the date of these proceedings enured to the benefit of Earl Spencer Douglas David Compton; (d) August 18, 1947, a settlement in favour of the first younger child which operated to benefit Lord William James Bingham Compton.

The wife's rights, powers and interests which arose under the settlements fell into three categories: (i) she was a trustee under all four settlements; (ii) she had a life interest on the happening of certain events in the money settled under the two settlements dated December 19, 1946, in favour of her daughters; (iii) she had a power of appointment as between her two daughters only on the happening of certain events, under the settlements dated April 11, 1947, and August 18, 1947, respectively, which operated in favour of her two sons. The court was further asked under the terms of this application to extinguish or alter the wife's rights, powers and interests under a tenancy agreement dated November 7, 1952, whereby the Compton Estates Company Ltd. let by way of post-nuptial settlement to the husband and the wife jointly for a term of 90 years the ancient mansion (one of the Compton family seats) of Compton Wynyates in the County of Warwickshire. (As appears from the judgment, this matter was resolved by agreement.)

By the husband's second application, which was also dated October 6, 1958, he sought an order under section 24 of the Matrimonial Causes Act, 1950, on the wife to execute a settlement out of property and investments given to her by the husband since the marriage, so as to provide (1) (a) that property and investments to the value of £110,000 be settled on the children of the marriage on discretionary trusts; (b) that property and investments to the value of £30,000 be settled on trust for the wife for life, and after her death upon trust for the child, Earl Spencer Douglas David Compton, or (2) such other provisions be made for the benefit of the husband and children as might be just.

The matter came before Mr. Registrar Townley-Millers by way of preliminary investigation on July 3 and 23, 1959, when both the husband and the wife and other witnesses were called and cross-examined. His report first came before Stevenson J. on December 10, 1959, when the children of the marriage, who had not been separately represented before the registrar, were again not represented independently. Stevenson J. decided that the matter ought not to proceed without separate representation of the children, and he made an order under rule 44 (3) of the

Matrimonial Causes Rules, 1957, appointing the husband guardian ad litem in order that they should be separately represented. In accordance with a direction dated May 27, 1938,[2] the wife, the trustees under the settlements, and the four children of the marriage through the husband as guardian ad litem, served notices of their intention to apply that the registrar's report should be varied and certain of its proposals not confirmed.

The notice given on behalf of the children put forward new proposals that had never been advanced or considered before the registrar. The substance of those proposals, which dealt only with the application for an order to be made against the wife that she settle a proportion of her separate property upon the children, was that the sum of £140,000 (or its equivalent property or investments) be ordered to be settled on the four children in equal shares, and that the Public Trustee be appointed sole trustee of the settlement.

The matter came before Marshall J. on January 14, 15 and 18, 1960, who had a transcript of the arguments and evidence given before the registrar, in addition to the affidavits filed on behalf of the parties.

The husband was the sixth holder of the Marquisate of Northampton and came of very ancient lineage. His family name was Compton, and as holder of the title he had inherited two old and stately homes together with their very valuable contents. The older was Compton Wynyates in the County of Warwick, where his forebears had been known to reside since 1204. The second was Castle Ashby in Northamptonshire, the building of the present house having been commenced by the first Lord Compton in 1574. The husband regarded the conservation of the family line and estates as a trust. It was accepted as common knowledge by the court that the growth of taxation in all its forms had rendered the task of passing on such an inheritance intact to a successor in the title one of mounting difficulty which required much foresight and planning. Towards this end, the husband had made a settlement known as the Canonbury settlement on December 31, 1932. It was primarily in favour of the heir to the Marquisate, and involved property and investments valued at £1,100,000: its present value was £1,387,000 together with the

[2] Direction of May 27, 1938 (as revised in 1950): "... If any party "seeks, under r. 53 (3) to vary the "report of the registrar, he shall "serve on the other parties concerned, "and file a notice setting out with "sufficient particularity the variation "sought."

1960

COMPTON v. COMPTON AND HUSSEY.

shareholding in the Compton Estates Company Ltd., which was the legal owner of the two family houses at the date of the hearing. On June 17, 1942, the husband entered into a deed of covenant by way of marriage settlement to leave the wife £4,000 per annum on his death. This deed of covenant was disclaimed by deed dated January 9, 1953, other financial provisions having been made by the husband in favour of the wife, but it showed the husband's views at that time as to the minimum annual income which should be provided for his widow after his death.

The parties married on June 18, 1942. There was a substantial difference in their ages, the husband being 56 and the wife only 22. On the same day the husband made a new will, the terms of which in so far as they related to the wife having some bearing on the issues before the court. Under it the wife was left a legacy of £1,000; and it was made plain by clause 4 that any provision made in the will for the wife was to be in addition to that provided under the settlement of June 17, 1942. It also gave to her a right to take a lease of Compton Wynyates and its contents for renewable periods of not exceeding three years at a yearly rent of £5; but any such lease was to be determined on the wife's remarriage or death without leaving children. Subject to any such lease the property was to be held on trust for the husband's sons in tail with remainders over to distant relatives. In addition the husband left to the wife an annuity of £4,000 a year if and so long as she held a lease of Compton Wynyates and its contents; and the husband expressed the hope that this annuity together with the marriage settlement would enable her to accept the grant of such a lease. These provisions were held to be of importance since they indicated a strong desire on the part of the husband that Compton Wynyates should be available to her to live in after his death, and that she should have the means to render this financially possible.

In the years 1946 and 1947, that is after the birth of the heir in April, 1946, the husband made the four settlements in favour of his children which were the subject of the application to vary under section 25.

The two settlements in favour of the daughters were made in December, 1946, each of which settled a sum of £25,000 on each daughter. The trustees under each settlement were Baring Brothers and the wife. The capital and income until the daughters reached 22 years or married before reaching 22 years were to accumulate; and were either of them to die before

reaching that age the money thus accumulated was to go to the wife, if still alive, absolutely. In the event of her predeceasing either daughter the money was to go to Earl Spencer Compton; and in the event of his prior death to whoever held the title of Marquess of Northampton at the time. The money accumulated under the settlement in favour of Lady Judith Compton had reached £44,816 by June 16, 1959; the amount accumulated under Lady Elizabeth Compton's settlement had reached the figure of £45,215.

On April 11, 1947, the husband made a further settlement in favour of his "younger child or children." In the events that had happened the beneficiary under this settlement would be Earl Spencer Compton. The sum settled was again £25,000, and the wife was again one of the trustees. She received no beneficial interest under this settlement, but she was given a power of appointment exercisable in the event of the death of both sons before reaching 21 years, which enabled her to appoint amongst her two daughters. The capital and income was to accumulate until the son reached the age of 21; and by June 16, 1959, had reached the figure of £50,648.

The last settlement was dated August 18, 1947, and it was in favour of the "youngest child," namely, the Honourable William James Bingham Compton. The sum settled was £25,000. The trustees were again Baring Brothers and the wife. The terms of the settlement were the same as under the previous settlement and they included the same power of appointment in the wife. The accumulated sum under it on June 16, 1959, was £39,793.

On February 18, 1947, the husband executed a deed of gift in favour of the wife "in consideration of his natural love and "affection" for her. Under it property and investments to the value of £121,350 were transferred to her. The estimated value of this property at the date of the hearing was in the region of £227,000, and the wife received from it an annual income of between £8,000 and £10,000.

The court was asked to order the wife to make a settlement in favour of the children out of this sum. About a fortnight after this deed of gift, namely, on March 3, 1947, the wife made a will. It showed that apart from the capital transferred to her under the deed of gift dated February 18, 1947, her only capital was £5,000 which she had left in equal shares to her two sisters. Apart from certain bequests of jewellery, and after payment of

1960

COMPTON v. COMPTON AND HUSSEY.

all debts, funeral and testamentary expenses and legacies, she bequeathed all the residue of her real and personal property to trustees upon trusts which, after making certain provisions in favour of her two daughters, left everything to Earl Spencer Compton on his attaining 21 years. In the event of Earl Spencer Compton dying before attaining 21 years it was to go to "such other son "of mine as shall first attain 21 years, or if there should be "no surviving son then to the person who shall succeed to the "title and dignity of Marquis of Northampton."

This will was superseded by another signed on April 3, 1953. Although the terms of this will were different, its importance lies in the fact that the wife still distributed her possessions among members of the family, and the ultimate beneficiary thereunder was the heir to the marquisate. A codicil dated October 9, 1954, did not vary substantially the residuary trusts contained in this will.

The only other relevant document executed in this period was a will made by the husband on September 7, 1947, which revoked all previous testamentary dispositions. In it the wife was left the husband's wearing apparel, consumable stores, horses, cars and equipment in connection therewith. She was permitted to have the use of jewellery during her widowhood. The contents of Compton Wynyates were settled on trust to permit the wife to have the use thereof during her life, she being responsible (reasonable wear and tear excepted) for keeping them in repair and insured. The only money legacy to be received by the wife under this will was a sum of £1,000.

On April 8, 1948, the sum of £19,000 was paid to the wife by the husband, who in an affidavit dated October 3, 1958, swore that he paid it to her with the same object as he transferred the property under the deed of gift dated February 18, 1947. The recollection of both the husband and the wife concerning the circumstances surrounding this payment was vague and unreliable. The only matter upon which both agreed was that the £19,000 resulted from the sale of a valuable pearl necklace. The wife said that that was an outright gift to her by the husband at the time of her marriage, in which case she would be entitled to receive the proceeds arising from its sale. The court did not accept that the facts of that transaction were quite so simple. It appeared that the necklace was something of an heirloom and a part of the Compton family jewellery, and it was held that it was given on marriage to the wife for use in her adornment as the

then Marchioness of Northampton; and that it was never contemplated that the wife would dispose of it outside the family. Confirmation of that was to be found in clause 2 (i) of the wife's will of March, 1947: "To my son the Honourable Spencer "Douglas David Compton commonly called Earl Compton the "three-row pearl necklace . . . which was given to me by my "said husband on our marriage," which showed that it was to go to the heir to the title, and that the decision to sell was made by the husband with a view to reducing the tax payable on his death, and that he transferred the money to the wife with the same object.

The parties continued to live together until October, 1957, when they separated. By this time the wife had formed a close friendship with the co-respondent, and a petition for divorce on the ground of adultery between them was filed by the husband. The suit was not defended; and on July 25, 1958, after a short hearing, Mr. Commissioner Raeburn Q.C. granted a decree nisi which become absolute on October 28, 1958. The children were made wards of court upon the application of the husband in January, 1959, spending their holidays from school, by order of Upjohn J., equally between the parents. The wife married the co-respondent, and the husband also remarried.

R. J. A. Temple Q.C. and *W. D. Collard* for the husband.

Gilbert Beyfus Q.C. and *Donaldson Loudoun* for the wife.

J. G. Strangman Q.C. and *E. I. Goulding* for the children, the husband being their guardian ad litem.

(Baring Brothers & Co. Ltd. and Compton Estates Co. Ltd. were represented by solicitors.)

Argument was in chambers.

Cur. adv. vult.

MARSHALL J. stated the facts substantially as set out above and continued: At the hearing before the registrar the parties agreed that his report should be made on the basis that nothing could be said against the husband as father or the wife as mother of the children. The hearing before me proceeded on the same agreed basis; but it should be said that it is impossible for any court in proceedings of this kind to exclude from its mind the fact that the break up of this marriage arises out of the wife's adulterous association with the co-respondent, and that she put that association above the preservation of the matrimonial home,

1960

COMPTON v. COMPTON AND HUSSEY.

Marshall J.

which in normal circumstances must always be regarded as in the children's best interest.

I now pass to the consideration of the first application, made under section 25 of the Matrimonial Causes Act, 1950, for an order to vary the terms of the four settlements on the children previously set out.

The first point taken by Mr. Beyfus on the wife's behalf is fundamental. He has submitted that the four settlements in question are not "post-nuptial settlements made on the parties "whose marriage is the subject of the decree." This submission was made before the registrar, but later abandoned before the hearing was concluded. It has, however, been revived before me and I must deal with it. If he were right in that submission this court would have no jurisdiction to make any order upon this application. I do not entertain any doubt that this submission is wrong. These settlements are settlements of property made in the course of marriage, and they deal with the interests of the children of the marriage. In the disposal of the property for the benefit of each child the respondent wife has been given a voice both as trustee and under a power of appointment, even though it is the husband who provides all the money. Under the settlements on the two daughters she also has a beneficial interest in reversion. A settlement can settle on parties to a marriage power over the disposal of property as well as over the property itself.

In these circumstances I hold that all four settlements come within my jurisdiction under section 25 of the Matrimonial Causes Act, 1950.

I am reinforced in this view by a passage in the judgment of Hill J. in *Hargreaves* v. *Hargreaves*,[1] in which he defines the marriage settlement as "a settlement made in contemplation of "or because of marriage and with reference to the interests of "married people or their children." It is true that that case was decided under section 5 of the Matrimonial Causes Act, 1859, or section 192 of the Supreme Court of Judicature (Consolidation) Act, 1925; but a comparison of those sections with section 25 of the Act of 1950 will show that the operative words in all three sections are identical and the powers arising under them the same.

One of the variations asked for can be disposed of shortly. The wife through her counsel has raised no objection to the

[1] [1926] P. 42, 45; 42 T.L.R. 252.

extinction of her beneficial interest under the two settlements dated December 19, 1946, in favour of her two daughters. Accordingly, on that ground I make an order that the wife's beneficial interest under the two settlements dated December 19, 1946, be extinguished as if she were dead or had died at the date of the decree absolute.

Ought I to order her removal as a trustee under all four settlements? The registrar's report recommends that she be allowed to remain as trustee under all four. I confirm that recommendation. The removal of a trustee can often involve a serious reflection on the character of a person in that he has wrongly exercised his trustee powers. I have not heard one single piece of evidence against the wife to justify the least expectation that she is likely to abuse her position as a trustee. I think that ought to be said. In any event, I do not order her removal for the reason that this Division, in my judgment, has no jurisdiction to do so. The proper Division to apply to remove trustees is the Chancery Division, whose jurisdiction includes such matters.

The registrar's report further recommends that the wife's powers of appointment under the settlements dated April 11, 1947, and August 18, 1947, be extinguished. This question is a great deal more difficult. It requires a careful assessment of what is involved in the exercise of such power. The following points are important and relevant: (1) The power is not one which enables the wife to appoint any sum under the settlement outside the family. It is confined to a power to decide in certain remote contingencies how sums released by such contingencies shall be allocated as between her two daughters. (2) The contingency referred to in (1) is the following: if both sons die before reaching 21 the wife would be enabled to appoint among the daughters. The elder son is now nearly 14, the younger is just over 12. It is a power, therefore, that can only fall to be exercised in the next seven or eight years. (3) The husband is now 74 and one cannot rule out entirely the possibility of his death before the end of this seven or eight years' period. Should that happen the wife, who is still under 40, would be the only surviving parent. (4) There is no evidence to suggest that the wife is on any but the best terms with both daughters, and nothing to suggest that she would discriminate unfairly against the one or the other. (5) I have a feeling that this power of appointment was given to the wife as the mother of these daughters rather than in her capacity of Marchioness of Northampton. (6) On the other hand,

1960

COMPTON v. COMPTON AND HUSSEY.

Marshall J.

the money under these settlements was provided by the husband by whose wish the power of appointment was given. He now wishes the power extinguished, and his wishes should be respected. Nor can there be any doubt that the husband in endowing the wife with these powers did so in the belief that his marriage would remain intact.

In argument it was urged upon me by Mr. Strangman that there were three main reasons why I should confirm this recommendation of the registrar: (1) Because it is a common form order in such cases as these to do so; (2) there was no sufficient ground for departing from such a common form order; (3) without a power of appointment the money would certainly be divided equally between the daughters. I confess that none of these considerations make a strong appeal to me. To suggest that a discretionary jurisdiction should be exercised "in common form" runs counter to my view of its true nature, and the certainty that the money would be divided equally between the daughters does not necessarily carry with it the certainty that in all circumstances an equal division would be a just one.

The registrar has recommended the extinction of this power of appointment on other grounds. He regards the exercise of this power in future as potentially dangerous, largely, if I read his report aright, because the wife in the witness-box left an impression upon him of insincerity, and because he formed the view that to continue her power of appointment would be "un- "necessary, unjust and unsafe." Those are strong words. If I am to endorse this view I must feel that they can be justified. I recognise that the registrar had the advantage of seeing the wife under cross-examination in the witness-box. There is no substitute for that, but a careful reading of the transcript left me unconvinced. She showed a muddled recollection and a tendency to fight to give as little away as possible in the hope that by so doing she would be able to keep as much of the money, or power over money, as she could. That made her an unsatisfactory witness. The husband's evidence, affidavit and oral, showed some clear misstatements of fact under oath, a faulty recollection, and a clear tendency to concede nothing where the wife and Captain Hussey were concerned. Both were unreliable witnesses; but I am not prepared to impugn the honesty of either or of one more than the other.

The power when given was never "necessary." If it is "unjust," unjust to whom? No argument or evidence convinced

me of its injustice. If it is "unsafe," there was no evidence or argument that carried conviction to show whom it endangered.

I approach the issue from the angle of whether it has been established that the interests of the husband and/or children, financial or otherwise, would be prejudiced by the wife continuing to hold this very restricted power of appointment. She remains the children's mother, and she has access to them. She remains a trustee under the settlements; and if she acts properly in that office nothing is likely to be done to remove her. If she remains as trustee, acting as a trustee should, I cannot see any real danger in allowing her to keep her power of appointment.

I do not confirm this recommendation in the registrar's report.

This leaves only the tenancy agreement of November 7, 1952. Very little argument was addressed to me upon it; and I have a very real doubt whether such an agreement comes within the terms of section 25 of the Matrimonial Causes Act, 1950. The matter, I was assured, could and would be amicably resolved as the wife was willing to renounce her rights on an assurance given by the husband that he would bear the cost of preparation of the documents legally necessary to effect such renunciation. On this part of the case I make no order, by consent of both parties.

I now pass to a consideration of the second application, namely, that I should exercise my powers under section 24 of the Matrimonial Causes Act, 1950, to order the wife to settle out of her separate property a sum of £110,000 on the children of the marriage on discretionary trusts, and a further £30,000 on trust for herself for life and after her death upon trust for Earl Compton. The registrar in his report has recommended that the wife be ordered to settle £120,000 upon the children as well as a further £30,000 in trust for herself for life, and thereafter upon trust for Earl Compton.

The separate representation of the children has resulted in a new proposal being put forward on their behalf in the notice of December 23, 1959. They now ask through their guardian ad litem that the sum settled be £140,000, divided equally among the four children under a trust of which the Public Trustee would be the sole trustee.

What are the principles that must guide me? I think the best statement, which indeed I follow, is to be found in *March* v. *March and Palumbo*,[2] which was a case under section 5 of the

[2] (1867) L.R. 1 P. & M. 437, 440.

1960

COMPTON v. COMPTON AND HUSSEY.

Marshall J.

Act of 1859. The Judge Ordinary (Lord Penzance) said [3]: "But "the intention of the legislature cannot be doubted . . . in "applying this section to the circumstances of any particular "case the first consideration will be this: what is the nature "and extent of the pecuniary change—and I stress the word "'change'—operated by the wife's criminality? The court "will look at the probable pecuniary position which the parties "and their children would have occupied if the marriage which "the settlement contemplated had been a binding union, and the "parties had lived in harmony together upon their joint incomes. "If this union has been broken and the common home has been "abandoned by the criminality of one without fault in the "other it seems just that the innocent party should not in addi-"tion to the grievous wrong done by the breach of the marriage "vow, be wholly deprived of means to the scale of which he may "have learnt to accommodate his mode of life; nor, viewing the "matter on the other side, does it seem either just or equitable "that funds which were intended at the time of the marriage for "the use of both should be borne off by the guilty party and "perhaps transferred to the hands of the adulterer as the dowry "of the second marriage. The interests of society point in the "same direction. It would be an evil example if this court were "to decide that the entire fortune of a wealthy married woman "was to be reckoned as part of the prospects of an adulterer, or "the resources of a second home for a guilty woman. Regarding, "then, the matter in this light, and with the view of restoring "in a reasonable degree the pecuniary status of the parties . . . "the court proceeds. . . . The relative sums contributed by each "party, the conduct of each, the total amounts of their joint "income, the relation it bears to the requirements of the parties "and their respective prospects of increased income, are all "elements to be considered. These elements are not capable of "exact expression in figures and the result must be a general "one, varying according to the details of each case." That decision went to appeal before the full court [4]; and again the principles set out by Lord Penzance were endorsed. *Hartopp* v. *Hartopp and Akhurst* [5] is another case setting out in somewhat different words the same principle, and that was further underlined by a decision of Bucknill J. in *Lorriman* v. *Lorriman and Clair*.[6]

[3] L.R. 1 P. & M. 437, 442.
[4] Ibid. 444.
[5] [1899] P. 65; 15 T.L.R. 168.
[6] [1908] P. 282; 24 T.L.R. 575.

I now turn to the facts of this case to apply the principles thus laid down in the cases to which I have referred. There are certain important facts which I bear in mind: (1) The wife by way of capital brought nothing to the resources of the Compton family at the time of the marriage or at any time thereafter; (2) the property and funds which she now possesses, which amount to just over £227,000, were provided solely by the husband by way of the deed of gift dated February 18, 1947. They were a part of the family's resources owned by him as holder of the title of Marquess of Northampton.

Mr. Beyfus urged upon me that the origin of the fund is not a matter which I am entitled to consider. I am unable to understand why, for apart from stating that this was so, he advanced no reasons why the origin of the money should not be taken into account. I should have thought that if a court had power to order a settlement out of the funds of the guilty party acquired from sources outside and independent of the marriage, it has equal power, and in most cases greater reason, to order a guilty party to settle funds acquired from the innocent party in contemplation of the marriage.

In my judgment it is impossible to assess the pecuniary change brought about by the wife's "criminality" in a case of this kind without taking into account the fact that the moneys were given to the wife by the husband and came out of the family resources.

Prior to the deed of gift the husband was providing the wife with the modest sum of £650 per annum by way of pin money. On June 17, 1942, he entered into a deed of covenant by way of marriage settlement to leave the wife £4,000 per annum on his death. The next day, June 18, 1942, he executed a new will whereby he left a further annuity of £4,000 per annum if and so long as she held a lease of Compton Wynyates and its contents, and he expressed the hope that this annuity and her marriage settlement would enable her to accept the grant of such a lease. By the same will the wife was given a right to take a lease for not exceeding three years (renewable for like periods) at a nominal rent of £5 per annum of Compton Wynyates and its contents but such lease was to be determined on the wife's remarriage or death without leaving children. I think that at this stage—the inception of the marriage—the mind and motives of the husband were clear, and he made what he regarded as the necessary dispositions to render his hopes practicable. His desire was to see the wife so endowed as to enable her after his death to live on in comfort at Compton Wynyates. Though different steps were later taken

1960

COMPTON
v.
COMPTON
AND HUSSEY.

Marshall J.

by the husband to make the fulfilment of his hopes possible, I am satisfied on a consideration of the documents and the evidence that the husband continued to act with this consideration in the forefront of his mind. He told me that he decided to transfer to the wife the sum of £121,350 by way of a deed of gift for that same purpose, and in substitution for the earlier provision he had made. I accept that, although I think that other considerations were operating alongside that consideration. I am satisfied that apart from her living at Compton Wynyates, the husband acted from a desire to see that the wife had resources of her own, but that the size of the gift was dictated by what the husband knew would be required to enable her to live at Compton Wynyates. I also think that he acted by way of deed of gift in the hope that on his death his tax liabilities would thereby be reduced.

The wife's evidence was that although her living at Compton Wynyates was vaguely discussed, she had no understanding with the husband that the extent of the resources with which she was being provided were dictated by the fact that she would live after the husband's death at Compton Wynyates, thereby providing for the rest of the children a home to which they could go when the new holder of the title was installed in Castle Ashby. I do not accept her evidence in this respect. I am satisfied that the husband made clear to her the purpose of the gift and that the wife herself, prior to the break-up of the marriage, accepted what was given for the purposes for which it was intended. The big disparity in the ages of the parties rendered such an arrangement prudent. The terms of the various wills executed, dated June 18, 1942, March 3, 1947, September 7, 1947, and April 3, 1953, are consistent with this view, as is the joint tenancy agreement dated November 7, 1952.

I have therefore come to the conclusion that the wife was given her present capital (save £5,000) by the husband in the belief that the marriage would be preserved until his death, and that thereafter it would be available to the wife as his widow; that she would use it for the benefit of her children as well as herself, and that after her death such money as was left would remain for distribution within the Compton family. The break-up of this marriage in divorce has altered all that. No one can have any doubt that there has been, to use the words of Lord Penzance in *March* v. *March and Palumbo*[7]: " a pecuniary change operated

[7] L.R. 1 P. & M. 437, 440.

" by the wife's criminality." In the circumstances of this case a serious change has occurred.

I do not accept the argument of Mr. Beyfus that merely because the Marquess has not now to meet the extra income tax arising out of his wife's income, that the Marquess is for all purposes and all respects a man who must be described as better off. It appears to me quite impossible to argue that when a man has given away £121,000 for a particular purpose, and that particular purpose is frustrated, that he is no worse off certainly from a capital point of view. Though the Compton family is far from poor, it is faced with the heavy financial burden of maintaining in the conditions of our modern society the status of a titled and ancient lineage. It is important that financial resources intended to be used toward that end should be available for that purpose.

The wife has admitted that she is living above her means; that her money is being used to keep her house at Egerton Crescent going, where she now lives in matrimony with Captain Hussey. New affections and loyalties are attaching themselves to her. On May 4, 1959, she made a new will; and when she gave evidence before the registrar she was by no means quick to disclose that she has left a life interest in her property to the man whose adultery with her has broken up the home life of the family that endowed her. She has left him 53, Egerton Crescent and its contents absolutely. It is true that she leaves her residuary estate in trust for distribution in equal shares among her children. There is no guarantee, however, as to what the amount of that residuary estate will be. It is out of the question that she could ever, in decency, live at Compton Wynyates with the co-respondent and the children. That she realises that is shown by her willingness to renounce her tenancy.

I have no doubt in all the circumstances of this case that I have a duty to restore, as far as is reasonable and just, the pecuniary status of the parties that has so materially been changed by this divorce. All the material elements cannot be assessed exactly in figures. I must try to arrive at a just result. It is no part of my task to punish the wife financially for her conduct: I merely try to restore the past financial hopes and expectations of the family. The husband asks nothing for himself. He would have been entitled to an order in his favour had he asked. He now supports the figures advanced by counsel for the children and a settlement in the terms sought on their behalf. In

1960

COMPTON v. COMPTON AND HUSSEY.

Marshall J.

my judgment the terms put forward by Mr. Strangman are reasonable and just. They still leave the wife with a substantial sum.

Accordingly, I do not confirm the recommendation in the registrar's report in this regard. I make an order in the following terms: (1) that the wife execute a settlement of £140,000 (or the equivalent in property in Clerkenwell and/or investments managed by Baring Brothers) upon her children, Lady Judith Compton, Lady Elizabeth Compton, Earl Spencer Compton, the Honourable William James Bingham Compton, in equal shares; (2) that the Public Trustee be the sole trustee; (3) that the share of each be held on trust for him or her during his or her life and after death in trust for children in equal shares; (4) in the event of any of the four dying without issue, the share falling in to accrue to the others; (5) that there shall be the usual statutory power of maintenance and advancement; (6) the trustee to have full discretionary power to pay any child all or any part of the capital of its share.

I favour a deed along the lines of a draft document submitted to me.

Solicitors: *Jaques & Co.; Lewis & Lewis and Gisborne & Co.; Freshfields.*

J. B. G.

END OF VOLUME AND OF PROBATE SERIES FOR 1960.

The Mode of Citation of the Volumes of the *Law Reports* for 1960 is as follows:

[1960] Ch. [1960] P.

[1960] 1 Q.B. [1960] 2 Q.B.

[1960] A.C.

INDEX

ADMIRALTY—Arrest of vessel. See COMPANY.

CHARITY — Land held on trust for. See ECCLESIASTICAL LAW.

COMPANY—*Winding up—Execution—Arrest of vessel—Action in rem—Voluntary liquidation — Whether creditor for necessaries can become secured creditor by arresting company's vessel after notice of meeting to propose voluntary winding up—Companies Act*, 1948 (11 & 12 *Geo.* 6, *c.* 38), *s.* 325.

Admiralty—Arrest of vessel—Action in rem —Necessaries claim—Whether arrest "execution"—Companies Act, 1948 (11 & 12 *Geo.* 6, *c.* 38), *ss.* 228, 325.

Ships' Names—Zafiro.

JOHN CARLBOM & CO. LTD. *v.* ZAFIRO (OWNERS). THE ZAFIRO - **Hewson J. 1**

CONSISTORY COURT—Jurisdiction—Lease. See ECCLESIASTICAL LAW.

CRUELTY—Intention to injure. See HUSBAND AND WIFE.

CUSTODY (CHILD) — Estoppel. See ESTOPPEL 1.

2. —— Infant—Remarriage of parents. See HUSBAND AND WIFE 8.

DESERTION—Amendment to pleading. See HUSBAND AND WIFE 2.

DISCOVERY—Privilege. See PRACTICE 1.

DIVORCE — Insanity. See HUSBAND AND WIFE 6, 7.

2. —— Paternity — Presumption of legitimacy. See HUSBAND AND WIFE 5.

ECCLESIASTICAL LAW—*Faculty—Lease —Faculty to rector to grant option to take lease—Jurisdiction of consistory court.*

Charity—Land held on trust for—Powers of trustees—Incumbent of living—Church vested in him — Whether he has Settled Land Act powers — Court with jurisdiction to approve grant of lease—Application for faculty to consistory court—Settled Land Act, 1925 (15 & 16 *Geo.* 5, *c.* 18), *s.* 29—*Charitable Trusts Amendment Act*, 1855 (18 & 19 *Vict. c.* 124), *s.* 29.

In re ST. SWITHIN'S, NORWICH **J. H. Ellison Ch. 77**

ESTOPPEL — *Per rem judicatam — Husband and wife—Custody—Whether spouse estopped in custody proceedings from making allegations which could have been made at hearing of suit for divorce.*

HULL *v.* HULL - - - **Sachs J. 118**

2. —— —— —— *Divorce—Petition by husband alleging desertion — Previous nullity proceedings by husband—Dismissal of wife's charges of cruelty in previous proceedings— Wife's answer to husband's petition alleges constructive desertion—Whether wife estopped from repeating cruelty allegations.*

FISHER *v.* FISHER - - - **C.A. 36**

EXECUTION—Arrest of vessel. See COMPANY.

FACULTY — Lease. See ECCLESIASTICAL LAW.

HUSBAND AND WIFE—*Cruelty—Intention to injure — Child of marriage, brutality to — Whether cruelty to wife—Whether intention to injure necessary.*

WRIGHT *v.* WRIGHT - - - **C.A. 85**

2. —— *Desertion—Three years from presentation of petition—Amendment to pleading— Amendments of cross-petition and reply to cross-petition to allege desertion—Three years' desertion not completed at date of original petition and answer — Three years' desertion completed at date of hearing — Validity of amendments—Effect of disposing of original prayer before allowing amendments — Matrimonial Causes Act*, 1950 (14 *Geo.* 6, *c.* 25), *s.* 1 (1) (*b*)—*Matrimonial Causes Rules*, 1957 (*S.I.* 1957, *No.* 619), *r.* 3 (2)—*R.S.C., Ord.* 70, *r.* 1.

Practice—Non-compliance with rule of court — Dispensation by court — Whether court

HUSBAND AND WIFE—*continued.*

empowered to authorise disregard of rule in advance—New petition for divorce before prior petition disposed of—R.S.C., Ord. 70, *r.* 1.
BLACKER *v.* BLACKER - - - **C.A. 146**

3. —— Divorce—Estoppel. See ESTOPPEL 2.

4. —— —— *Expedition — Jurisdiction to grant interim relief—Originating summons by wife for leave to present petition within three years of marriage — Determination on summons adjourned sine die—Injunction sought to restrain husband from interfering with occupancy of matrimonial home — Matrimonial Causes Act*, 1950 (14 *Geo.* 6, *c.* 25), *s.* 2—*Matrimonial Causes Rules*, 1957 (*S.I.* 1957, *No.* 619), *r.* 2—*Supreme Court of Judicature (Consolidation) Act*, 1925 (15 *& 16 Geo.* 5, *c.* 49), *s.* 45.

Practice and Procedure — Writ — Leave to issue—Position pending leave—Application for interim relief — Injunction — Jurisdiction — Supreme Court of Judicature (Consolidation) Act, 1925, *s.* 45.

Injunction — Interlocutory — Jurisdiction to grant — Position pending leave to bring proceedings—Supreme Court of Judicature (Consolidation) Act, 1925, *s.* 45.
WINSTONE *v.* WINSTONE - - **Winn J. 28**

5. —— —— *Paternity—Presumption of legitimacy—Adultery by wife and marital intercourse at time of conception—Husband using contraceptive sheaths.*

Infant—Custody—Presumption of legitimacy —Use of contraceptive sheaths.
FRANCIS *v.* FRANCIS - - **Divl.Ct. 17**

6. —— —— *Insanity—Care and treatment —Absence from mental hospital for treatment for tuberculosis — Matrimonial Causes Act*, 1950 (14 *Geo.* 6, *c.* 25), *s.* 1 (1) (*d*)—*Divorce (Insanity and Desertion) Act*, 1958 (6 *& 7 Eliz.* 2, *c.* 54), *s.* 1 (1) (3).
MESURE *v.* MESURE - **Lloyd-Jones J. 184**

7. —— —— —— *"Incurably of unsound mind"—Test of—Matrimonial Causes Act*, 1950 (14 *Geo.* 6, *c.* 25), *s.* 1 (1) (*d*).
WHYSALL *v.* WHYSALL - **Phillimore J. 52**

8. —— —— *Remarriage of parties to each other — Effect of remarriage upon custody proceedings in their previous divorce suit — Matrimonial Causes Act*, 1950 (14 *Geo.* 6, *c.* 25), *s.* 26 (1).

Infant—Custody—Divorce Court—Effect of remarriage of parents upon custody proceedings in their previous divorce — Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 26 (1).
GRAINGER *v.* GRAINGER AND CLARK
Sachs J. and C.A. 99

HUSBAND AND WIFE—*continued.*

9. —— *Maintenance—Judicial separation—Quantum—Wealthy husband—Assessment of "just" amount—Effect of taxation—Husband domiciled abroad: wife resident in England—"Jointure" test no longer usefully employable in assessing amount—Matrimonial Causes Act*, 1950 (14 *Geo.* 6, *c.* 25), *s.* 20 (2).
SCHLESINGER *v.* SCHLESINGER - **Sachs J. 191**

10. —— —— *Justices—Revocation of order — Earliest date from which revocation can take effect — Summary Jurisdiction (Married Women) Act*, 1895 (58 *& 59 Vict. c.* 39), *s.* 5 (*c*)—*Magistrates' Courts Act*, 1952 (15 *& 16 Geo.* 6 *& 1 Eliz.* 2, *c.* 55), *s.* 76.
FILDES (FORMERLY SIMKIN) *v.* SIMKIN
Divl.Ct. 70

11. —— —— —— *Wilful neglect to maintain — Wife living apart from husband on medical grounds — Forced separation — Effect on husband's liability to maintain—Whether neurotic wife justified in refusing to return—Summary Jurisdiction (Married Women) Act*, 1895 (58 *& 59 Vict. c.* 39), *s.* 4.
LILLEY *v.* LILLEY - **Divl.Ct. and C.A. 158**

12. —— *Nullity — Jurisdiction — Marriage celebrated in jurisdiction—Voidable marriage — Incapacity — Husband resident and domiciled in Scotland—Wife resident in England —Matrimonial Causes Act*, 1857 (20 *& 21 Vict. c.* 85), *s.* 22 — *Supreme Court of Judicature (Consolidation) Act*, 1925 (15 *& 16 Geo.* 5, *c.* 49), *s.* 32.
HILL (ORSE. PETCHEY) *v.* HILL
Collingwood J. 130

13. —— *Settlement—Variation—Interests of children — Post-nuptial settlements upon the children with the wife as trustee and with powers of appointment—Propriety of guilty wife to remain trustee and retain powers—Absence of evidence she would abuse her position — Applications to remove trustees — Chancery Division appropriate—Settlement of wife's property—Marriage broken by wife's adultery—Property given to her by husband—Restoration of pecuniary status—Matrimonial Causes Act*, 1950 (14 *Geo.* 6, *c.* 25), *ss.* 24 (1), 25.
COMPTON (MARQUESS OF NORTHAMPTON) *v.* COMPTON (MARCHIONESS OF NORTHAMPTON) AND HUSSEY - - - **Marshall J. 201**

INFANT — Custody — Presumption of legitimacy. See HUSBAND AND WIFE 5.

2. —— —— Remarriage of parents. See HUSBAND AND WIFE 8.

INJUNCTION—Interlocutory. See HUSBAND AND WIFE 4.

INSANITY — Divorce. See HUSBAND AND WIFE 6, 7.

JUDICIAL SEPARATION — Maintenance. See HUSBAND AND WIFE 9.

LEGITIMACY—Presumption of. See HUSBAND AND WIFE 5.

MAINTENANCE — Judicial separation. See HUSBAND AND WIFE 9.

2. —— Justices. See HUSBAND AND WIFE 10.

3. —— Wilful neglect to maintain. See HUSBAND AND WIFE 11.

NECESSARIES — Claim — Arrest of vessel. See COMPANY.

NULLITY OF MARRIAGE — Incapacity — Jurisdiction. See HUSBAND AND WIFE 12.

PER REM JUDICATAM—Estoppel—Divorce. See ESTOPPEL.

PRACTICE — *Discovery — Privilege — Professional privilege—Taxation of costs—Privilege attaching to brief—Divorce.*
HOBBS *v.* HOBBS AND COUSENS
Stevenson J. 112

2. —— Non-compliance with rule of court. See HUSBAND AND WIFE 2.

PRACTICE AND PROCEDURE—Leave to present petition for divorce. See HUSBAND AND WIFE 4.

SETTLEMENT — Variation. See HUSBAND AND WIFE 13.

WILFUL NEGLECT TO MAINTAIN — Maintenance. See HUSBAND AND WIFE 11.

THE
LAW REPORTS
1960

Title, Table of Cases and Index to

Chancery Division
and
Probate Division

THE INCORPORATED COUNCIL OF LAW REPORTING
FOR ENGLAND AND WALES

THIS PART CONTAINS THE FOLLOWING INDEXES TO "THE LAW REPORTS, 1960":

TITLE, TABLE OF CASES, AND INDEX TO

CHANCERY AND PROBATE DIVISIONS;

QUEEN'S BENCH, VOL. 2, DIVISION;

APPEAL CASES.

INSTRUCTIONS TO BINDERS

THE LAW REPORTS, 1960

These Reports, when bound, will consist of the (1960) Chancery Vol., Queen's Bench Vol. 1 and Vol. 2, Probate Vol., and Appeal Cases Vol.

CHANCERY DIVISION.—Chancery Parts I to XI and the Index will be required for binding.

QUEEN'S BENCH DIVISION.—Vol. 1, Parts I to VII and the Index will be required for binding.

QUEEN'S BENCH DIVISION.—Vol. 2, Parts VIII to XI and the Index will be required for binding.

PROBATE DIVISION.—Probate Parts I to XI and the Index will be required for binding.

APPEAL CASES.—Appeal Cases Parts I to XI and the Index will be required for binding.

Cancel Advertisements, Circulars, Notices, Monthly Indexes and * Signatures.

Chancery Division

a, *b* and 1 to 41

Vol. 2 Queen's Bench Division	Probate Division
a, *b* and 1 to 35	*a* and 1 to 17

Appeal Cases

a, *b* and 1 to 56

QL 12.1.61